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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ERNST & YOUNG LLP,

Petitioner,

vs.

P. LaRUE SIMPSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

OPPOSITION OF RESPONDENT P. LaRUE SIMPSON TO MOTIONS FOR LEAVE TO FILE AMICI BRIEFS

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INTRODUCTION

Respondent P. LaRue Simpson respectfully requests that this Court deny the motions of the Big Six Accounting Firms [Arthur Anderson {sic.} et. al.] and Sixteen Law Firms [Arnold & Porter, et. al.] for leave to file amici curiae briefs. Simpson refused consent to these entities to file amici curiae briefs. Because Simpson has withheld consent, the motions for leave to file amici briefs are not favored. Supreme Court Rule 37(2)(b). Simpson denied consent to the alleged amici because they are not neutral, disinterested parties who are poised to provide assistance to the court. Instead, the alleged amici are biased entities which are professionally and financially aligned with Ernst & Young.

None of the proposed amici possess any information relevant to Simpson's employee status under the ADEA and ERISA. Further, the briefs of the proposed amici curiae grossly misconstrue the opinion of the United States Court of Appeals for the Sixth Circuit. They fail to cite the prior opinion of the United States Supreme Court in Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989) and contain no analysis of Nationwide Insurance Co. v. Darden, 503 U.S. 322, 112 S.Ct. 1344 (1992). Adoption of their arguments would, however, require the United States Supreme Court to overrule both opinions. The briefs submitted by the proposed amici also disregard the deceptive and discriminatory misconduct of Ernst & Young. The alleged amici burden the United States Supreme Court with hyperbolic rhetoric and distorted legal analysis. The motions for leave to file amici briefs should be denied.

I. THE PROPOSED AMICI ARE FRIENDS OF ERNST & YOUNG, NOT FRIENDS OF THE UNITED STATES SUPREME COURT.

A true amicus curiae appears as a "'friend of the court', as distinguished from an advocate before the court." Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974). Courts refuse to extend amicus curiae status to one with an interest in the litigation, or to one who appears to be an advocate for a party to the litigation. Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65 (D.N.J. 1993). An amicus curiae provides a benefit to the court only if it encourages an "objective, dispassionate, neutral discussion of the issues." United States v. Gotti, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991). If it is apparent that the proposed amicus curiae comes before the court not as a neutral party, but rather as an advocate for one side, then the alleged amicus "does the court, itself and fundamental fairness a disservice." Id.

Far from being neutral, the entities which petition the United States Supreme Court to appear as amici curiae in this litigation have a direct professional or financial affinity with Ernst & Young. Many of the sixteen law firms that join in the Arnold & Porter brief appear frequently as Ernst & Young's litigation counsel in cases throughout the United States. Paul, Hastings, Janofsky & Walker, for example, represented Ernst & Young in 1996 in litigation before the United States Court of Appeals for the Ninth Circuit. *See*, Fidel, et.al. v. Young, et. al., 1996 U.S. App. LEXIS 24422. Weil, Gotshal & Manges LLP, Davis Polk & Wardwell, and Fried Frank, Harris Shriver & Jacobsen all appear routinely as counsel for Ernst & Young LLP. (*See*, Exhibit 1, documentation of case captions and counsel indicating representation

of Ernst & Young by alleged amici law firms). Dickson, Wright, Moon, VanDusen & Freeman lists Ernst & Young as a major client in Martindale-Hubbel. (See, Exhibit 2). In a recent interview with the National Law Journal, Ernst & Young General Counsel Kathryn Oberly described how she prefers to spread Ernst & Young's litigation among numerous outside law firms. She identified purported amici Davis Polk & Wardwell and Lantham & Watkins as particular favorites, "with which we have long term relationships." (*See* Exhibit 3, February 17, 1997 National Law Journal article at B3). The purported amici law firms therefore are not neutral, disinterested entities. Instead, they have a direct financial interest in lending support to Ernst & Young, their valuable and well-paying client.

Similarly, the accounting firms who join the Arthur Anderson {sic.} petition filed by Gibson Dunn & Crutcher, constitute, in conjunction with Ernst & Young, the Big 6 of international accounting practice. They frequently appear as codefendants in major lawsuits, such as the California Savings & Loan litigation referenced above. (*See*, Fidel v. Young, 1996 U.S. App. LEXIS 24422.) Moreover, they habitually join to support one another in amici petitions, such as the one filed herein. For example, in Plaut, et.al. v. Spendthrift Farm, Inc. et. al., 1 F.3d 1487 (6th Cir. 1993), *aff'd* 514 U.S. 211, 115 S. Ct. 1447 (1995), proposed amici Deloitte, Haskins & Sells, along with their present counsel, Gibson, Dunn & Crutcher, were named as co-defendants in a securities fraud action involving a thoroughbred horse farm. Kathryn Oberly, General Counsel for Ernst & Young, filed an amicus curiae brief in their support, just as Gibson Dunne & Crutcher has done for Ernst & Young herein. Joining in the Ernst

& Young amici brief were proposed amici Arthur Andersen & Company, KPMG Peat Marwick and Price Waterhouse. (*See*, Ex. 4). In Axel Johnson Inc. v. Arthur Andersen & Co., 6 F.3d 78 (2nd Cir. 1993), Gibson, Dunn, & Crutcher and Deloitte & Touche returned the favor by rallying to Arthur Andersen's aid, with Gibson, Dunn & Crutcher filing an amici brief on Arthur Andersen's behalf as counsel for Deloitte & Touche. Ernst & Young and KPMG Peat Marwick joined their friends in this petition. The Big 6 accounting firms have joined forces on other amici briefs as well. (See, Exhibit 4, Ceres Partners v. GEL Associates, et. al., 918 F.2d 349 (2nd Cir. 1990) (Ernst & Young filed a joint amici curiae brief on behalf of itself, Coopers & Lybrand, Peat Marwick Main & Co. and Price Waterhouse); The Florida Bar Re: Advisory Opinion, 613 So. 2d 426 (Fla. 1992) (Joint amici brief submitted by Arthur Andersen & Co., Coopers & Lybrand, Deloitte & Touche, Ernst & Young, KPMG Peat Marwick and Price Waterhouse); Richards Auto City, Inc. v. Director, Division of Taxation, 659 A.2d 1360 (N.J. 1995) (Joint amici brief submitted by Ernst & Young, Coopers & Lybrand and Deloitte & Touche); Checkosky, et. al. v. SEC, 23 F.3d 452 (D.C. Cir. 1994) (Kathryn Oberly, General Counsel of Ernst & Young submitted joint amici brief on behalf of Arthur Andersen & Co., Deloitte & Touche, Ernst & Young and KPMG Peat Marwick.)) This pattern of concerted activity belies the contention of the proposed amici that they seek to provide neutral, dispassionate assistance to the Court.

In addition, most of the Big 6 accounting firms have participated in mergers comparable to that whereby Arthur Young and Ernst & Whinny merged to create Ernst

& Young LLP, such as the merger of Deloitte, Haskins & Sells with Touche, Ross to create Deloitte and Touche LLP, or the merger of Klynveld Main Goerdler (KMG) Main Hurdman with Peat Marwick & Mitchell to create KPMG Peat Marwick LLP. (*See* Generally, Stephens, Mark, *The Big Six, The Selling Out of America's Top Accounting Firms*, Simon & Schuster, 1991). Extensive reductions in partner ranks routinely follow such events. Stephens describes the purging of partners which occurred at Deloitte, Haskins & Sells and KPMG Peat Marwick after their mergers, in order to preserve "slots for new partners. . . the lifeblood of the firm." Stephens, *The Big Six* at 172-173. Ernst & Young's Management Committee Member Jesse Miles used the exact same phrase, about protecting the "lifeblood of the organization," as his justification for analyzing Ernst & Young partners by age in order to select older persons for termination. (Record, Vol. XI at 1051, Tr. 5/2/94 at 1051). Many of these proposed amici firms have been sued in the past for age discrimination by "partners." (*See*, e.g. Wheeler v. Hurdman, 825 F.2d 257 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987) (predecessor to KPMG Peat Marwick; Caruso v. Peat, Marwick & Mitchell, 664 F. Supp. 144 (S.D.N.Y. 1987). They have a direct interest in assisting Ernst & Young in achieving dispensation for its illegal actions, because they perceive that they too will be protected by a rule of law that prohibits scrutiny of their conduct.

Thus the law firms and accounting firms who seek leave to appear as amici curiae are actually friends of Ernst & Young, not friends of the Court. So eager are they to rally around their fallen comrade, "like the cavalry riding belatedly to the

rescue" Lane v. First National Bank of Boston, 871 F.2d 166 (1st Cir. 1989), that they fail to disclose to the Court their own pecuniary interests and professional interrelationships with Ernst & Young. The proposed amici do "fundamental notions of fairness a disservice" by cloaking their fraternal affiliations with Ernst & Young under the guise of disinterested, neutral advisors to the Court.

Ernst & Young already is well represented by Mayer, Brown & Platt, Dinsmore & Shohl and in-house counsel. Supplemental assistance is hardly needed to articulate the position of Ernst & Young, the self-proclaimed "largest integrated professional services firm in the nation." (Exhibit 3 at B1). Under these circumstances, where the proposed amici are biased advocates, the party they seek to assist is well represented, and consent to appear as amici curiae has been refused, amici curiae status should not be granted. *See*, Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970).

II. THE PROPOSED AMICI CURIAE SUBMIT MISLEADING AND INACCURATE LEGAL ANALYSIS TO THE UNITED STATES SUPREME COURT.

A. The Sixth Circuit Court of Appeals defined the term "employee," not the term "partner."

Contrary to the position of the alleged amici curiae, the Sixth Circuit of Appeals did not create a new federal law of partnership. Instead, the Court of Appeals for the Sixth Circuit construed the term "employee" as utilized in the ADEA and ERISA. The Sixth Circuit scrutinized plaintiff's position in the firm to see if he was excluded from the definition of "employee" by virtue of possessing the common law attributes of a *bona fide* general partner. Drawing a comparison to the law excluding independent contractors from employee status, the Sixth Circuit noted that "*bona fide* independent

contractors and partners are employers, not employees; and as employers, neither come within the entitlement protection or coverage of either the ADEA or ERISA." (Appendix A at 9a.) In adopting this analysis, the Sixth Circuit followed the holding of the United States Supreme Court in Nationwide Insurance Corp. v. Darden, 503 U.S. 318, 112 S.Ct. 1344 (1992) and concurred with the reasoning of the United States Courts of Appeals for the Tenth Circuit, Eleventh Circuit, Ninth Circuit, and Eighth Circuit (and implicitly approved by the Second Circuit) in similar cases.

B. The Sixth Circuit reviewed the stipulated evidence to determine if Simpson possessed the common law attributes of a *bona fide* general partner or an employee.

"Applying an analog of the Supreme Court's pronouncements in Darden to the record in this case," (Appendix A at 9a) the Sixth Circuit determined that:

> the promoters of the Ernst & Young merger had wilfully devised a management structure which was, from its very inception, designed to preclude Simpson and his similarly situated associates from any *bona fide* ownership interest, fiduciary position, management control, voting rights and privileges, share in the profits, and meaningful vote in firm decisions, including decisions involving job security. Moreover, by threatening vigorous enforcement of a "non-compete clause" against Simpson to embrace "all clients or potential clients" of Ernst & Young, which had become one of the world's largest professional service firms, defendant effectively foreclosed Simpson from pursuing his profession as a CPA for two years.

Appendix A at 11a-12a.

Thus the analysis of the stipulated evidence by the Sixth Circuit established that Ernst & Young engaged in intentional misrepresentation in accomplishing the merger, and that Ernst & Young exercised a power of coercion against "partners" whom they

could terminate without cause and threaten with a non-compete. The assumption of the would-be amici that the creation of Ernst & Young occurred by a voluntary agreement among persons of equal standing ignores this clear determination by the appellate court.

Further, despite the rhetoric of the alleged amici, the opinion of the Sixth Circuit has no bearing upon the conduct of partnerships under the laws of each state. The Sixth Circuit did not find Simpson to be an employee because Ernst & Young had centralized management. The Sixth Circuit found Simpson to be an employee because he had no right to participate in selection of the management, no authority to know what the management was doing, and no power to protect himself from management committee decisions that were devastating to his interest. Ernst & Young's operations presented a unique factual situation to the Sixth Circuit. Only entities intentionally scheming to strip "partners" of the true rights and privileges of ownership need fear the results of this case. Certainly, none of the alleged amici have altered their conduct in the aftermath of the Sixth Circuit opinion, nor did they so react after the opinion of the district court.

Nor does the opinion have tax law implications. In fact, the Internal Revenue Service recognizes that it adopts a definition of partnership that "is broader in scope then the common law meaning of partnership and may include groups not commonly called partnerships." 26 CFR §301.7701-3(a). Further, the creation of entities such as limited liability partnerships has no relationship to the opinion by the Sixth Circuit. The opinion only considered the distinction between "employee" and *bona fide* general

partners for the purposes of the ADEA and ERISA. The court did not address, nor has any court ever addressed, the applicability of the ADEA and ERISA to members of a limited liability partnership.

C. The United States Supreme Court would be required to overrule its prior opinions in Community for Creative Non-Violence v. Reid and Nationwide Insurance Co. v. Darden in order to adopt the arguments of the alleged amici curiae.

The purported amici curiae argue that the United States Supreme Court is bound by the law of each of the fifty states in determining whether an individual is an "employee," as opposed to a *bona fide* general partner, under federal statutory law. They argue that the Sixth Circuit erred in relying upon the Uniform Partnership Act to develop federal common law criteria to distinguish between employees and partners when interpreting the term "employee" under the ADEA and ERISA. In Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989), the United States Supreme Court held exactly the opposite. The Supreme Court noted its past practice of interpreting the term "employee" in federal statutes in accordance with the common law. In a unanimous opinion, the United States Supreme Court held:

> In past cases of statutory interpretation, when we have concluded that Congress intended terms such as "employee," "employer" and "scope of employment" to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms. [Citations omitted]. This practice reflects the fact that 'federal statues are generally intended to have uniform nationwide application.' Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43, 109 S.Ct. 1597, 1605, 104 L.Ed.2d 29 (1989). Establishment of a federal

> rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national, uniform copyright law by broadly pre-empting state statutory and common law copyright regulation. See 17 U.S.C.§301 (a). We thus agree with the Court of Appeals that the term "employee" should be understood in light of the general common law of agency.

Id. at 2173. The Supreme Court applied this general common law standard to define the term "employee" under the Copyright Act of 1976, and relied upon the Restatement of the Law of Agency to identify the common law factors. Reid, 109 S.Ct. at 2179.

This holding was reaffirmed and relied upon by the United States Supreme Court in the unanimous opinion delivered by Justice Souter in Nationwide Insurance Co. v. Darden, 503 U.S. 318, 112 S.Ct. 1344, (1992). In Darden, the Court adopted a federal common law test for defining "employee" under ERISA, based upon the common law test developed in Reid. The United States Supreme Court held: "As in Reid, we construe the term [employee] to incorporate 'the general common law of agency, rather than ... the law of any particular State.'" Darden, 503 U.S. at 323, n.3, 112 S.Ct. at 1348, n.3, quoting Reid v. Community for Creative Non-Violence. The Supreme Court holding in Darden directly contradicts the position of the alleged amici, who insist that the Supreme Court apply the law of each state to define "employee" under ERISA.

The purported amici curiae omit analysis of the holdings in Reid or Darden in their briefs. (The Big 6 Accounting firms cite neither case; the sixteen law firms make only one oblique reference to Darden.) Instead, the proposed amici cite Kamen v.

Kemper Financial Services, 500 U.S. 90, 111 S.Ct. 1711 (1991), as alleged authority requiring the application of state law to define "employee" under federal statutes. The opinion of the United States Supreme Court in Kamen, however, does not even address the issue of defining a term in a federal statute. Instead, Kamen concerns creation of a common law rule to effectuate a private cause of action under a federal statute. Kamen involved a specific situation wherein the appellate court adopted a rule (abolishing the demand futility exception in shareholder derivative actions) to effectuate a private cause of action under federal statute, which contradicted the requirements of many state courts.

No comparable situation is presented here. The Sixth Circuit Court of Appeals defined a term in a federal statute; it did not create a common law rule to "fill the interstices of a federal remedial scheme." Id. at 97, 111 S.Ct. at 1717. In addition, the Sixth Circuit Court of Appeals relied upon the Uniform Partnership Act, adopted by forty-eight states, to determine common law criteria distinguishing employees from *bona fide* general partners. It did not adopt common law factors which contradicted existing state law. Kamen therefore has no legal or factual applicability to this case.

In addition, the alleged amici urge reliance upon De Sylva v. Ballentine, 351 U.S. 570, 76 S. Ct. 974, (1956). Over a strong dissent, the Supreme Court in De Sylva held that the definition of "children" entitled to renewal rights under the federal Copyright Act should be determined by reference to state law, particularly because the matter of domestic relations was "primarily a matter of state concern." Id. at 580. The alleged amici urge the Court to rely upon this 1955 case interpreting the term

"children" under the Copyright Act, even though the holding is easily distinguishable based upon the unique state interest in family law. Simultaneously, the alleged amici disregard the unanimous 1989 decision in Reid defining "employee" under the Copyright Act. Such an argument appears disingenuous when "employee" is the exact term at issue in this case. Further, the alleged amici offer no analysis of Darden, which is the controlling United States Supreme Court precedent establishing that "employee" is to be given a federal common law definition under ERISA. Again, when definition of "employee" under ERISA is the precise issue at stake in this litigation, the decision of the alleged amici to ignore Darden is inexplicable.

Far from "bring[ing] to the attention of the Court relevant matter not already brought to its attention by the parties," Supreme Court Rule 37(1), the alleged amici curiae offer to assist this Court by concealing controlling precedent and arguing irrelevant case law. Acceptance of their argument would require the United States Supreme Court to overrule the reasoning of two recent Supreme Court opinions. The decision by counsel for the alleged amici to cite easily distinguishable authority, while omitting analysis of controlling United States Supreme Court precedent, raises serious concerns of whether their conduct is "unbecoming a member of the Bar of this Court." Supreme Court Rule 8(1). Certainly, in terms of a proposed amici curiae brief, such legal analysis is not helpful to the court and should be disallowed. *See*, Gotti, 755 F. Supp. at 1158.

D. Ernst & Young argued throughout this litigation for the court to deny Simpson employee status based upon analysis of the common law criteria of *bona fide* general partnership.

Throughout the proceedings before the district and appellate courts, Ernst & Young urged reliance upon Darden and the common law criteria of partnership. Ernst & Young cited to the Uniform Partnership Act and to law of New York, (the law designated as controlling in the Ernst & Young Agreement of the Parties - U.S) in its motion for summary judgment. Ernst & Young observed that New York: "adopted the Uniform Partnership Act in 1919 with modifications not relevant for purposes of this action. The New York Partnership Act adopted the U.P.A. definition of partnership without modification." Record 163 at 1825, Defendant's Second Motion for Summary Judgment at 14; *See* also Id. at 21. ("An essential of a partnership, either under common law rule or under Section 11 of the New York Partnership statute, is ... [unlimited liability for the actions of a partner]"). The Sixth Circuit noted that it was: "Applying an analog of the Supreme Court's pronouncements in Darden to the record in this case, as suggested by Ernst & Young ...," when it determined that Simpson was an employee, rather than a *bona fide* general partner. Appendix A at 9a.

Ernst & Young of course never raised as error in its petition for certiorari the fact that the appellate court accepted its argument to follow Darden and analyze Simpson's status as an "employee" based upon review of the common law attributes of *bona fide* general partnership. Ernst & Young undoubtedly knew, however, of this argument at the time it filed its certiorari petition because Eleven law firms represented by the same counsel as the Sixteen Law Firms herein (Kathleen Burke of Jones, Day,

Reavis & Pogue), appeared as amici curiae in the appellate court to make the same argument. (*See*, Brief for Eleven Law Firms As Amici Curiae In Support of Appellant [Ernst & Young], (6th Cir. 95-3209) filed July 31, 1995).

In short, the proposed amici raise an issue which the petitioner knowingly chose not to advocate in its petition for certiorari and which contradicts the arguments made by the petitioner before the district, appellate and United States Supreme Court. Absent exceptional circumstances, proposed amici curiae will not be permitted to raise issues which the petitioner waived. *See*, Christopher M. v. Corpus Christi Independent School District, 933 F.2d 1285 (5th Cir. 1991); Richardson v. Alabama State Board of Education, 935 F.2d 1240 (11th Cir. 1991). Nor may alleged amici curiae usurp the prerogative of a party by introducing new issues which the party elected not to pursue. State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, *cert. denied*, 115 S.Ct.298, 130 L.Ed.2d 211 (1994). "Amici are allowed to participate on appeal in order to assist the court in achieving a just resolution of issues raised by the parties. We know of no authority which allows an amicus to interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore." Lane, 871 F.2d at 175. It is particularly abhorrent to fundamental fairness for alleged amici curiae to claim as error a legal analysis which was urged by the party they support. The asserted amici, as in Gotti, do "the court, itself and fundamental notions of fairness a disservice." Gotti, 755 F.Supp.at 1159.

E. The proposed amici curiae identify no difference between state law and the common law of partnership which would alter the analysis of Simpson's employee status.

Even if federal law required this Court to apply state law to define a term in a federal statute, [which is erroneous], no error would have occurred herein because the law of New York and the Uniform Partnership Act are identical. Ernst & Young concedes this point. Record 163 at 1825, Defendant's Motion for Summary Judgment at 14). Further, as noted in Wheeler, forty-eight states adopt the Uniform Partnership Act. Wheeler, 825 F.2d at 257. The alleged amici identify no distinction between any state's law and the Uniform Partnership Act. Instead, they merely reargue the flawed position of Ernst & Young that the parties can "agree" to anything and still call the result a partnership. In precise mimicry of Ernst & Young, the professed amici describe the mandatory provisions of the Uniform Partnership Act, such as the right of access to the books and records of the firm, the obligation to disclose on demand all material things affecting the partnership, and the creation of a fiduciary duty among partners, as "default provisions." They exalt the "voluntary agreement" by Simpson to the terms of the Ernst & Young documents, ignoring that the Sixth Circuit specifically found them to be the result of coercion, deception and misrepresentation by Ernst & Young. The Court has heard all these arguments before. They are exactly the same arguments made by Ernst & Young. No purpose is served by burdening this Court with two alleged amici briefs which merely parrot the contentions of the petitioner. *See*, Gotti, 755 F. Supp. at 1158. Leave to submit the proposed amici briefs should therefore be denied.

F. No court has ever ruled that limited liability partners are excluded from the definition of "employee" under the ADEA and ERISA.

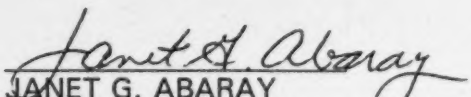
The only issue before this Court on Ernst & Young's petition for certiorari is whether Simpson possessed sufficient characteristics under the common law of a *bona fide* general partner to exclude him from the definition of employee under the ADEA and ERISA. The alleged amici anxiously leap to the assumption that limited liability partners are excluded from the definition of "employee" under the ADEA and ERISA as well. The federal courts, however, have never addressed this issue. Nor is the issue presented in Simpson's case, because Ernst & Young did not restructure to claim limited liability partnership status until after the Simpson verdict. The alleged amici who claim limited liability partnership status (which includes all the accounting firms in the Anderson {sic} petition, and five of the sixteen law firms, as well as Ernst & Young) have no interest in the outcome of this petition for certiorari because none of them are general partnerships. Leave to claim amici curiae status should not be granted to entities with such a tangential interest in the outcome of the litigation.

III. CONCLUSION

The proposed amici curiae come to this Court exposed as biased advocates. They impose upon this United States Supreme Court to urge adoption of a rule of law which would require this Court to overrule controlling precedent, which they neglect to discuss. They take a position which contradicts that urged by the petitioner over the course of six years of litigation. Simpson respectfully suggests that the actions of the alleged amici have increased the burden upon the litigants and caused an

unnecessary complication of this litigation. The parties have vigorously issued the actual issues of this case to exhaustion. Justice is not served by delaying plaintiff's judgment in order to consider a meritless argument interjected by non-parties whose only intention is to assist their colleague by befuddling the issues properly before the court. Simpson therefore respectfully requests that the proposed amici petitions be denied.

Respectfully submitted,



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ALLEGED AMICI REPRESENTATION OF ERNST & YOUNG

DAVIS POLK & WARDWELL

Lindner Dividend Fund, Inc, et al. v. Ernst & Young, 880 F.Supp. 49 (D. Mass. 1995)

In re RISDIC Litigation (Brown University Employees Credit Union), 662 A.2d 64 (S. Ct. R.I. 1995)

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

Securities and Exchange Commission v. Ernst & Young, 775 F.Supp. 411 (D. C. 1991)

WEIL GOTSHAL & MANGES LLP

Pacific Mutual Life Insurance Co. v. First Republicbank Corporation, et al., 806 F.Supp. 108 (N.D. Texas 1992)

Askanase, et al. v. Tom J. Fatjo, Jr., et al., 828 F.Supp. 461 (S.D. Tex. 1993)

Pacific Mutual Life Insurance Company v. First Republicbank Corporation, et al., 53 F.3d 1409 (5th Cir. 1995)

TGX Corp., v. Gloria Annette Turner Simmons, et al., 997 F.2d 39 (5th Cir. 1993)

Federal Deposit Insurance Corporation v. Ernst & Young, 967 F.2d 166 (5th Cir. 1992)

Robert Castro, Jr., et al. v. Painewebber, Inc., et al., 866 F.Supp. 315 (E.D. Texas 1994)

LATHAM & WATKINS

Knapp, et al. v. Ernst & Whinney et al., 1996 U.S. App. LEXIS 18482 (9th Cir. 1996)

PAUL, HASTINGS, JANOFSKY & WALKER LLP

Fidel, et al. v. Young, et al., 1996 U.S. App. LEXIS 24422 (9th Cir. 1996)

3RD CASE of Focus printed in FULL format.

LINDNER DIVIDEND FUND, INC., a Missouri corporation and WHITEHILL CAPITAL, INC., a New York corporation, Plaintiffs, v. ERNST & YOUNG, a partnership consisting of Certified Public Accountants, formerly known as ERNST & WHINNEY, Defendant.

CIVIL ACTION NO. 92-12372-WJS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

880 F. Supp. 49; 1995 U.S. Dist. LEXIS 3868; Fed. Sec. L. Rep. (CCH) P98,863

March 23, 1995, Decided

COUNSEL: [**1] For LINDNER DIVIDEND FUND, INC., a Missouri Corporation, WHITEHILL CAPITAL, INC., a New York Corporation, Plaintiffs: Benedict Bader, I. Walton Bader, Bader & Bader, White Plains, NY.

For ERNST & YOUNG, a partnership consisting of Certified Public Accountants fka Ernst & Whinney, Defendant: Ira K. Gross, Laura Steinberg, Sullivan & Worcester, Boston, MA. Daniel F Kolb, Timothy J Mayopoulos, Jacqueline O LiCalzi, Norman B Champ, III, Davis Polk & Wardwell, New York, NY.

JUDGES: Walter Jay Skinner, United States District Judge

OPINIONBY: Walter Jay Skinner

OPINION: [*51] MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

March 23, 1995

SKINNER, S.D.J.

This is an action for violations of section 18(a) of the Securities and Exchange Act of 1934, 15 U.S.C. 78r(a), gross negligence under Missouri and New York state law, and violations of the Missouri Uniform Securities Act brought by plaintiffs to recover damages suffered allegedly as a result of their purchase of securities in reliance on defendant's false and misleading statements. Defendant moves to dismiss the amended complaint pursuant to Fed. R. Civ. P. 9(b), failure to plead fraud with particularity, and pursuant [**2] to Rule 12(b) for lack of jurisdiction over the subject matter, for failure to state a claim upon which relief can be granted and for being time-barred under the applicable statute of limitations.

[*52] Background

Plaintiffs Lindner Dividend Fund, Inc. and Whitehill Capital, Inc. commenced this action to recover damages allegedly suffered as a result of their purchase of preferred stock and debentures of the Bank of New England Corporation ("BNEC") during the period from August 1989 through January 1990. The initial complaint was filed on October 2, 1992 and alleged five causes of action: violations of sections 10(b) and 18(a) of the Securities and Exchange Act of 1934 ("1934 Act"), pendent state law claims for common law fraud and gross negligence, and a claim for violations of the Missouri Uniform Securities Act.

Defendant filed a motion to dismiss the initial complaint on July 23, 1993. At a conference held on July 28, 1993, plaintiffs' counsel indicated to this court that plaintiffs would file an amended complaint rather than respond to defendant's motion. Plaintiffs filed their amended complaint on October 25, 1993.

Count I of the amended complaint alleges violations of section [**3] 18(a) of the 1934 Act. Count II alleges "gross negligence and/or reckless conduct under common law." Count III alleges violations of section 409.101 of the Missouri Uniform Securities Act. The amended complaint does not contain the section 10(b) and common law fraud claims. At the July 28, 1993 conference, this court informed plaintiffs that any claims in the initial complaint not repleaded in the amended complaint would be dismissed. Accordingly, the section 10(b) and common law fraud claims of the original complaint are dismissed.

Like the initial complaint, the crux of the amended complaint is the allegation that defendant certified BNEC's misleading 1988 10-K Annual Report and the "integrated Annual Report to Stockholders of 1988" which were both filed with the SEC on March 20, 1989. Plaintiffs allege that the information in the

142ND CASE of Level 1 printed in FULL format.

In re RISDIC Litigation (Brown University Employees Credit Union).

No. 94-707-Appeal.

SUPREME COURT OF RHODE ISLAND

662 A.2d 64; 1995 R.I. LEXIS 213

August 10, 1995, Decided

August 10, 1995, FILED

PRIOR HISTORY: [**1] Appeal from Superior Court. Providence County. Krause, J. (PC 91-1776).

COUNSEL: Bradford Gorham (Gorham & Gorham, Inc.), Providence, William G. Grande, Providence, Paul V. Gallogly (Lovett, Schefrin, Gallogly & Harnett), Providence, Aram R. Schefrin (Lovett, Schefrin, Gallogly & Harnett), Providence, H. Lee Godfrey (Susman Godfrey L.L.P.), Houston, TX, James T. McCartt (Susman Godfrey L.L.P.), Houston, TX for plaintiffs.

Leonard Decof (Decof & Grimm), Providence, John S. Foley, (Decof & Grimm), Providence for Allan M. Shine, Receiver of RISDIC and Edward D. Pare, Jr., Receiver of Brown University Employees Credit Union.

James E. Carroll (Peabody & Arnold), Boston, Sheila High King (Peabody & Arnold), Providence, Kirsten M. Lacovara (Peabody & Arnold), Providence, Harvey Weiner (Peabody & Arnold), Boston for Certain former Directors & Officers of Brown University Employees Credit Union.

Stephen P. Nugent, Providence, James McAleer (McAleer & McAleer), Providence for defendants, Norman Baris and William J. McEnery.

Michael S. Schwartz (Mandell, DeLuca & Schwartz, Ltd.), Providence for defendant Joseph Bellucci, in his capacity as a RISDIC Director.

William C. [**2] Dimitri (Dimitri & Dimitri), Providence for defendant Peter Nevola.

Eva Marie Mancuso (Hamel, Waxler, Allen & Collins), Providence, Katherine Boyle O'Mealey (Hamel, Waxler, Allen & Collins), Providence for defendant Alan Washburn, Jr., in his capacity as a RISDIC Direc.

Peter J. McGinn (Tillinghas, Collins & Graham), Providence, Jerome G. Snider (Davis Polk & Wardwell), New York for defendant Ernst & Young.

JUDGES: Weisberger, C.J., Murray, Bourcier, JJ., Concurring. Shea, J. and Lederberg, J., Not Participating.

OPINIONBY: WEISBERGER

OPINION: [*65]

OPINION

PER CURIAM. This case came before a hearing panel of this court for oral argument on June 27, 1995. After hearing the oral arguments and examining the briefs filed by the receiver of the Brown University Employees Credit Union (Brown), the receiver of Rhode Island Share and Deposit Indemnity Corporation (RISDIC), certain former RISDIC directors, certain former directors and officers of Brown, and examining the briefs filed by the plaintiffs, who are former depositors/shareholders of Brown, we conclude that the issues raised by this appeal should be summarily decided. The plaintiffs appeal from a judgment of the Superior Court dismissing [**3] their complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Superior Court Rules of Civil Procedure. We affirm the judgment. The facts of the case insofar as pertinent to this appeal are as follows.

The plaintiffs were depositors/shareholders in Brown. Brown's deposits were insured by RISDIC. On January 1, 1991, the Governor of the State of Rhode Island concluded that RISDIC was insolvent and an-

99TH CASE of Level 1 printed in FULL format.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. ERNST & YOUNG, Defendant

Civil Action No. 91-1443

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

775 F. Supp. 411; 1991 U.S. Dist. LEXIS 14374; 60 U.S.L.W. 2328; Fed. Sec. L. Rep. (CCH) P96,281

October 9, 1991, Filed

COUNSEL: [**1]

Susan Feris Wyderko, William H. Kuehnle, John M. Gannon, Attorneys for the S.E.C.; Washington, D.C.

Francis J. O'Toole; Harvey L. Pitt, James H. Schropp, David B. Hardison, Robert J. Conlan, Fried, Frank, Harris, Shriver & Jacobson; Washington, D.C., Attorneys for Ernst & Young.

JUDGES: Thomas A. Flannery, United States District Judge.

OPINIONBY: FLANNERY

OPINION: [*411] MEMORANDUM OPINION

THOMAS A. FLANNERY, UNITED STATES DISTRICT JUDGE

This case comes before the Court upon the defendant's motion to dismiss for improper venue or, alternatively, to transfer to the Northern District of Texas.

I. Background

The Securities and Exchange Commission ("SEC") brought this civil enforcement action against Ernst & Young ("E & Y") seeking a permanent injunction that would prohibit alleged future violations by E & Y of the Securities and Exchange Act of 1934 and SEC Rules promulgated pursuant to that statute. E & Y moves that this action be dismissed because venue is not proper in the District of Columbia under Rule 12 (b)(3) of the Federal Rules of Civil Procedure, or, alternatively, that this Court use its discretion pursuant to 28 U.S.C. § 1404(a) to transfer this action to the Northern District of Texas.

E & Y is the nation's largest public accounting firm, a general partnership of certified public [**2] accountants with over 2,000 partners nationwide. E & Y, which has its headquarters in New York City, has offices in more than 130 cities throughout the country; it has two offices in the District [*412] of Columbia. This suit is based on actions of one of E & Y's predecessor partnerships, Arthur Young. E & Y resulted from the merger of Arthur Young and a second firm, Ernst & Whinney. n1

n1 Since E & Y does not dispute that it is responsible for the action of its predecessors, the Court will refer to the actions of E & Y, Arthur Young, and/or Ernst & Whinney collectively as being those of "E & Y."

Federal securities law requires certain corporations to file financial reports and proxy statements with the SEC in Washington, D.C. The filings must be signed by a certified public accounting firm attesting that the firm has performed certain procedures in accordance with SEC Rules and that, based on the results of their analysis, the accounting firm is of the opinion that the filings have been prepared in accordance with standard [**3] rules of accounting and accurately represent the corporation's financial status. The SEC Rules require that the accounting firm be "independent" of the corporation making the filing.

The SEC alleges that "from 1983 through at least 1990" E & Y aided and abetted repeated violations of federal securities laws n2 in conjunction with audits performed by the Dallas, Texas office of E & Y. Plaintiff SEC's Memorandum in Opposition to Defendant E & Y's Motion to Dismiss for Improper Venue, or Alternatively, to Transfer at 4. The audits were of two Texas-based companies, RepublicBank Corporation ("Republic") and Cullum Companies, Inc. ("Cullum"), a supermarket retailer. E & Y signed audit opinions for inclusion in SEC filings for both companies certifying, amongst other things, that E & Y was "independent" of those companies. The SEC alleges that

90TH CASE of Level 1 printed in FULL format.

PACIFIC MUTUAL LIFE INSURANCE CO. Plaintiff v. FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY AND CO., INC., GOLDMAN SACHS & CO., ERNST & YOUNG & CO., and SALOMON BROTHERS INC. Defendants. SECURITIES & EXCHANGE COMMISSION, Movant.

Civil No. 3:91-CV-0441-H

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

806 F. Supp. 108; 1992 U.S. Dist. LEXIS 10530; Fed. Sec. L. Rep. (CCH) P97,059

July 13, 1992, Decided

July 13, 1992, Filed

DISPOSITION: [**1] DENIED.

COUNSEL: For PLAINTIFF: Harold E. Vanberg, Jr., BURLESON PAGE & GIBSON, 2414 North Akard, Ste. 700, P.O. Box 190623, Dallas, TX 75201-1748, and Steward M. Weltman, Michael B. Hyman and Carol V. Gilden, MUCH SHELIST FREED DENENBERG AMENT & EIGER, 200 North LaSalle St., Ste. 2100, Chicago, IL 60601-1095

For First Republicbank Corp., IFRB Corp., & Morgan Stanley & Co., Defendant: Gerald C. Conley, JACKSON & WALKER, NationsBank Plaza, 901 Main Street, Ste. 6000, Dallas, TX 75202-3714. For Goldman Sachs & Co., Defendant: Bruce W. Collins, Fletcher L. Yarbrough, Marvin S. Sloman, Barry R. Bell, Jeffrey B. Lane and Lyman G. Hughes, CARRINGTON COLEMAN SLOMAN & BLUMENTHAL, 200 Crescent Court, Ste. 1500, Dallas, TX 75201. For ERNST & YOUNG, Defendant: Johnathan M. Hoff, WEIL GOTSHAL & MANGES, General Motors Building, 767 Fifth Avenue, New York, NY 10153; Morton L. Susman, WEIL GOTSHAL & MANGES, NCNB Plaza, 700 Louisiana, Ste. 1600, Houston, TX 77002; Robert G. Cohen and Carl D. Liggio, ERNST & YOUNG, 380 Madison Ave., 3rd Floor, New York, NY 10017. For Salomon Bros., Inc., Defendant: Ernest Figari, Jr., Donald Colleluori, FIGARI & DAVENPORT, NationsBank Plaza, 901 Main St., Ste. 4800, LB 125, [**2] Dallas, TX 75202, and Theodore Gewertz, WACHTELL LIPTON ROSEN & KATZ, 299 Park Avenue, New York, NY 10171-0149.

For S.E.C., Movant: Paula M. Billingsley, Assistant United States Attorney, 1100 Commerce St., Rm. 16G28, Dallas, TX 75242-1699.

JUDGES: SANDERS

OPINIONBY: BAREFOOT SANDERS

OPINION: [*109] MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiff's Motion to Reinstate Action and supporting memorandum, filed January 31, 1992; Defendants' [*110] Response in Opposition to Plaintiff's Motion, filed February 20, 1992; Plaintiff's Reply Memorandum, filed March 2, 1992; Plaintiff's letter to the Court, dated March 5, 1992; Defendants' letter to the Court, dated March 9, 1992; Plaintiff's letter to the Court, dated March 10, 1992; Defendants' letter to the Court, dated April 3, 1992; Plaintiff's letter to the Court, dated April 16, 1992; and Plaintiff's letter to the Court, dated April 29, 1992.

On June 8, 1992, pursuant to 28 U.S.C. § 2403(a), the Court certified its intent to find unconstitutional the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), Pub. L. No. 102-242, § 476, 105 Stat. 2236 (1991), and directed the United States to file any pleadings in support of the constitutionality [**3] of this statute by July 8, 1992. Accordingly, there is also before the Court the Statement of Interest of the United States and the Securities and Exchange Commission, filed July 6, 1992.

I. Factual Summary

This is a securities fraud case brought by Plaintiff Pacific Mutual Life Insurance Co. ("Pacific Mutual") on March 1, 1991. The lawsuit arises from Pacific Mutual's purchase in July and September 1987 of InterFirst 12-3/4% Notes due October 1, 1989. Pacific Mutual seeks compensatory damages under Section 10(b) of the Securities and

84TH CASE of Level 1 printed in FULL format.

DAVID ASKANASE, TRUSTEE and FITNESS CORPORATION OF AMERICA, Plaintiffs, v. TOM J. FATJO, JR., ET AL., Defendants.

CIVIL ACTION H-91-3140

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

828 F. Supp. 461; 1993 U.S. Dist. LEXIS 9132

April 5, 1993, Decided

SUBSEQUENT HISTORY: [**1] Adopting Order of June 22, 1993, Reported at: 1993 U.S. Dist. LEXIS 9105. Reported at: 828 F. Supp. 461 at 462.

COUNSEL: FOR DAVID ASKANASE, Trustee, FITNESS CORPORATION OF AMERICA, plaintiffs: Rhett G Campbell, Morris & Campbell, Ste 1617, 600 Jefferson, Houston, TX 77002, 713/659-8697.

FOR TOM J FATJO, JR, PARKGATE INC, A Corporation, defendants: Robert L Ketchand, Short & Ketchand, 11 Greenway Plaza, Ste 1520, Houston, TX 77046, 713-960-1996.

FOR JEFFREY A BAIR d/b/a CAJA: Timothy R McCormick, Thompson & Knight, Ste 3300, 1700 Pacific St, Dallas, TX 75201, (214) 969-1700.

FOR BAYOU PARK CLUB PARTNERSHIP, A Texas General Partnership, HFUND INC., defendants: Edmund Lee Haag, III, Fulbright & Jaworski, 1301 McKinney St, Ste 5100, Houston, TX 77010, 713-651-5151.

FOR RON HEMELGARN, GREAT LAKES LEASING AGENCY INTERNATIONAL, H & C INTERNATIONAL, HEMELGARN RACING INC, defendants: John Wesley Wauson, Wauson & Associates, 1300 Post Oak Blvd, Ste 410, Houston, TX 770056, 713-783-0303.

FOR BEECHMONT PARTNERSHIP, COORDINATED SPA SERVICES INC, TWENTY-FIRST CENTURY, KENNETH O MELBY, defendants: John Wesley Wauson, Wauson & Associates, 1300 Post Oak Blvd, Ste 410, Houston, TX 77056, 713-783-0303. Susan J Brandt, Thelan Marrin Johnson & Bridges, 600 Travis, Ste 6500, Houston, TX 77002, 713-224-6200.

FOR [**2] NEWTOWNE ENTERPRISES INC., JOHN SNIDEMAN dba Financial Services Corporation, JOHN SNIDEMAN dba Management Accounting Inc, defendants: Susan J Brandt, Thelan Marrin Johnson & Bridges, 600 Travis, Ste 6500, Houston, TX 77002, 713-224-6200.

FOR ERNST & YOUNG fka Ernst & Whinney, defendant: Richard W McLaren, Jr, Ernst & Young, Associate General Counsel, 2000 National City Center, Cleveland, OH 44114, 216/861-8326. Morton Lee Susman, Weil Gotshal & Manges, 700 Louisiana St, Ste 1600, Houston, TX 77002, 546-5000.

FOR HOUSPROPS INC, A Texas Corporation, PETER M JACKSON, HOUSTONIAN ESTATES INVESTMENT CO N V, A Netherlands Antilles Corporation, defendants: Frank G Jones, Fulbright & Jaworski, 1301 McKinney St, Ste 5100, Houston, TX 77010, 651-5151.

FOR HOUSTONIAN HOLDINGS PARTNERSHIP, A Texas Partnership, AHMED MANNAI, FITNESS INVESTMENT N V, A Netherlands Antilles Corporation, MANNAI INVESTMENT COMPANY INC, A Delaware Corporation, XANTOR INC, A Panamanian Corporation, defendants: Edmund Lee Haag, III, Fulbright & Jaworski, 1301 McKinney St, Ste 5100, Houston, TX 77010, 713-651-5151.

FOR ALEXANDER M MILLEY, PACIFIC ASSET HOLDINGS L P, A Delaware Limited Partnership, defendants: Jay [**3] J Madrid, Winstead Sechrest & Minick, 1201 Elm St, Ste 5400, Dallas, TX 75270, (214) 742-1700.

FOR PARKGATE ASSOCIATED LTD, defendant: Edmund Lee, Fulbright & Jaworski, 1301 McKinney, Ste 5100, Houston, TX 77010-3095, 713/651-5151.

FOR ROGER A RAMSEY, defendant: Ronald J Restrepo, Attorney at Law, 600 Travis, 4700 Texas Commerce Tower, Houston, TX 77002, 228-5100.

JOHN SNIDEMAN, FINANCIAL SERVICES CORPORATION, MANAGEMENT ACCOUNTING, INC., defendants: John Wesley Wauson, Wauson & Associates, 1300 Post Oak

10TH CASE of Level 1 printed in FULL format.

PACIFIC MUTUAL LIFE INSURANCE COMPANY, Plaintiff-Appellant, versus FIRST REPUBLICBANK CORPORATION, ET AL., Defendants-Appellees.

No. 92-1662

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

53 F.3d 1409; 1995 U.S. App. LEXIS 12727

May 26, 1995, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Texas. D.C. DOCKET NUMBER 3:91-CV-0441-H. JUDGE Barefoot Sanders.

COUNSEL: ATTORNEYS for appellant: Stewart M. Weltman, Chicago, IL.

FOR INTERVENOR USA: Barbara C. Biddle, Atty., Scott R. McIntosh, Appellate Staff, Civil Div., D. of J., Washington, DC.

ATTORNEYS FOR APPELLEES: FOR: MORGAN STANLEY & CO., DAVIS, POLK & WARDWELL, Hannah Berkowitz, James W.B. Benkard, NY/NY. HUTCHESON & GRUNDY, James L. Truitt, Dallas, TX. FOR ERNST & YOUNG: Robert G. Cohen, Kathryn Oberly, Ernest & Young, New York, NY. WEIL, GOTSHAL & MANGES, Jonathan M. Hoff, New York, NY. WEIL, GOTSHAL & MANGES, Morton Lee Susman, Houston, TX. FOR: SALOMON BROS., FIGIARI & DAVENPORT, Ernest E. Figari, Jr., Donald Colleluori, Dallas, TX. WACHTELL, LIPTON, ROSEN & KATZ, Theodore Gewertz, Robert B. Mazur, Claire D. Chappell, New York, NY. FOR: GOLDMAN & SACHS, CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, Marvin S. Sloman, Dallas, TX. SULLIVAN & CROMWELL, William Norfolk, Theodore Edelman, Tariq Maudaya, New York, NY.

FOR AMICUS: ANDERSON, ET AL., Eldon Olson, Leonard Novello, Gen. Cnsl., NY, NY. Jon N. Ekdahl, Chicago, IL.

JUDGES: Before POLITZ, [**2] Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

OPINIONBY: PER CURIAM

OPINION: [*1410] ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PER CURIAM:

We reversed the judgment of the district court with opinion at 997 F.2d 39 (5th Cir. 1993), and the Supreme Court affirmed by an equally divided vote. Our mandate has not been issued to the district court. The Supreme Court has now held § 27A(b) to be an unconstitutional breach of separation of powers. Plaut v. Spendthrift Farm, Inc., 131 L. Ed. 2d 328, 115 S. Ct. 1447 (1995). Under that decision the claims of plaintiff are barred, and the district court would be unable to do more than repeat its prior judgment. Therefore, our opinion and judgment are vacated, and the judgment of the district court is affirmed.

AFFIRMED.

16TH CASE of Level 1 printed in FULL format.

TGX CORP., Plaintiff, versus GLORIA ANNETTE TURNER SIMMONS, ET AL., Defendants-Appellants Cross-Appellees, versus GREENWICH INSURANCE COMPANY, ET AL., Defendants-Appellees Cross-Appellants. GAYLON D. SIMMONS, ET AL., Plaintiffs-Appellants Cross-Appellees, versus J.C. TEMPLETON, ET AL., Defendants-Appellees Cross-Appellants. PACIFIC MUTUAL LIFE INSURANCE CO., Plaintiff-Appellant, versus FIRST REPUBLICBANK CORP., ET AL., Defendants-Appellees.

No. 92-3375, No. 92-1662

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

997 F.2d 39; 1993 U.S. App. LEXIS 18359; Fed. Sec. L. Rep. (CCH) P97,664

July 20, 1993, Decided

SUBSEQUENT HISTORY: As Corrected. Petition for Rehearing Denied August 25, 1993, Reported at: 1993 U.S. App. LEXIS 24107.

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Texas. Appeal from the United States District Court for the Eastern District of Louisiana. D.C. DOCKET NUMBER 3:91-CV-0441-H. JUDGE Barefoot Sanders. D.C. DOCKET NUMBER CA-87-5298-H & CA-90-849-H. JUDGE Peter Beer

DISPOSITION: We REVERSE the orders of the district courts and reinstate the cases. We REMAND for further proceedings consistent with this opinion.

COUNSEL: For Plaintiff-Appellant (92-1662): Stewart M. Weltman, 135 South LaSalle St., Ste. 1918, Chicago, IL 60603, (312)419-4670. For INTERVENOR USA (92-1662): Barbara C. Biddle, Atty., Scott R. McIntosh, Appellate Staff, Civil Div., Rm. 3127, D. of J., 10th & Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-4052. For Appellants (92-3375): LEPAYRE, TERRELL & RANDAZZO, F. Henri Lapeyre, Jr., 400 Poydras St., Ste. 1980, NOLA 70130-3277, (504)524-5152.

For MORGAN STANLEY & CO. (92-1662): DAVIS, POLK & WARDELL, Hannah Berkowitz, James W.B. Benkard, 450 Lexington Ave., NY/NY 10017, (212-450-4000). HUTCHESON & GRUNDY, James L. Truitt, 901 Main St., Ste. 6200, Dallas, TX 75202-3714, (214/761-2800). For ERNST & YOUNG (92-1662): Robert G. Cohen, Kathryn Oberly, Ernest & Young, 380 Madison Ave., New York, NY 10017. WEIL, GOTSHAL & MANGES, Jonathan M. Hoff, Gen. Motors Bldg., 767 Fifth Ave., New York, NY 10153, (212/310-8000). WEIL, GOTSHAL & MANGES, Morton Lee Susman, NCNB Plaza, 700 Louisiana, Ste. 1600, Houston, TX 77002, (713/546-5196). For SALOMON BROS. (92-1662): FIGIARI & DAVENPORT, Ernest E. Figari, Jr., Donald Colleluori, NationsBank Plaza, 901 Main St., Ste. 4800 - LB 125, Dallas, TX 75202, (214/939-2000). WACHTELL, LIPTON, ROSEN & KATZ, Theodore Gewertz, Robert B. Mazur, Claire D. Chappell, 299 Park Ave., New York, NY 10171-0149, (212/371-9200). For GOLDMAN & SACHS (92-1662): CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, Marvin S. Sloman, 200 Crescent Ct., Ste. 1500, Dallas, TX 75201, (214/855-3000). SULLIVAN & CROMWELL, William Norfolk, Theodore Edelman, Tariq Maudaya, 125 Broad St., New York, NY 10004, (212/558-4000). For GREENWICH INS. CO., ET AL. (92-3375): James M. Garner, Dermot S. McGlinchey, Martha M. Young, J. Forrest Hinton, MCGLINCHEY, STAFFORD, CELLINI & LANG, 643 Magazine St., NOLA 70130, (504)586-1200. For J.C. TEMPLETON, ET AL. (92-3375): MONTGOMERY, BARNETT, ET AL., Patrick O'Keefe, Harold B. Carter, Jr., Stephen Williamson, Leila D'Aquin, 1100 Poydras St., 3200 Energy Centre, NOLA 70163-3200, (585-3200). For BDO SEIDMAN (92-3375): LISKOW & LEWIS, Julie E. Schwartz, One Shell Sq., 50th Fl., NOLA 70139-5001, (581-7979). HAYNES & BOONES, Donald C. Templin, Phillip Philbin, 901 Main St., Ste. 3100, NCNB Plaza, Dallas, TX 75202-3714, (214)651-5590.

For AMICUS: ANDERSON, ET AL.: Eldon Olson, Gen. Cnsl., Price Waterhouse, 1285 Avenue of the Americas, NY, NY 10019, (212-819-4878). Jon N. Ekdahl, 69 N. Washington, Chicago, IL 60601, (312-507-2345).

For INTERVENOR-USA (92-3375): Barbara C. Biddle, Atty., Scott R. McIntosh, Appellate Staff, Civil Div., Room 3127, Justice Dept., 10th & Penn. Ave., NW, Wash, D.C. 20530, 202-514-2541. Paul Gonson, Solicitor, Jacob H. Stillman, Associate Gen. Cnsl.,

3RD CASE of Focus printed in FULL format.

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff-Appellant, v. ERNST & YOUNG, et al., Defendants-Appellees.

No. 91-7193.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

967 F.2d 166; 1992 U.S. App. LEXIS 17560

August 3, 1992, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Texas. D.C. DOCKET NUMBER CA3-90-0490-H. JUDGE Barefoot Sanders

DISPOSITION: AFFIRMED.

COUNSEL: FOR FDIC: Dorothy Nichols, Assoc. Gen. Counsel, Colleen B. Bombardier, Senior Csl., Jerome A. Madden, Cnsl., Floyd I. Robinson, Sr. Cnsl., Melissa Satterwhite, FDIC, 550 17th St., 4th Fl., Washington, DC 20429, (202/898-3505), (H6022A), Ste. H-6108. HOPKINS & SUTTER, John P. Greenan, Vincent J. Hudock, Jr., Vera L. Peo, 3700 Bank One Ctr., 1717 Main St., Dallas, TX 75201, (214/653-2100). Hopkins & Sutter, John L. Conlon, Three First Nat. Plaza, Ste. 4200, Chicago, IL 60602, (312) 558-6650.

For Defendants-Appellees: ERNST & YOUNG, Kathryn A. Cherly, 1200 19th St., N.W., Ste. 400, Washington, DC 20036, (202) 663-9871. Carl D. Liggio, ERNST & YOUNG, 380 Madison Ave., 3rd Fl., New York, NY 10017, (212/773-3900). MAYER, BROWN & PLATT, Wendy A. Ackerman, 2000 Pennsylvania Ave., N.W., Washington, DC 20006. WEIL, GOTSHAL & MANGES, Morton L. Susman, 700 Louisiana, Ste. 1600, Houston, TX 77002, (713) 546-5200.

JUDGES: Before POLITZ, Chief Judge, and WILLIAMS and DUHE, Circuit Judges.

OPINIONBY: JERRE S. WILLIAMS

OPINION: [*168] JERRE S. WILLIAMS, Circuit Judge:

The Federal Deposit Insurance Corporation brought suit against Ernst & Young. The suit asserts that Arthur Young & Company and its successor Ernst & Young both negligently audited Western Savings Association and breached their contracts to audit Western Savings. The district court dismissed the breach of contract action for failure to state a claim. The court also granted Ernst & Young's motion for summary judgment on the negligence claim. The Federal Deposit Insurance Corporation appeals the two rulings.

I. FACTS

On August 30, 1982, Jarrett E. Woods, Jr. purchased 100% of Gatesville Savings and Loan Association's stock. He subsequently transferred the stock to Western Capital Corporation and changed the name of Gatesville Savings to Western Savings Association ("Western"). Woods also owned all of Western Capital Corporation. Woods, therefore, was Western's sole owner.

Woods effectively dominated and controlled Western. Upon acquiring Western, he expanded the board of directors [**2] and appointed himself as chairman and chief operating officer. He was also Western's chief executive officer, and he served on its executive, loan, audit, compliance, and credit policy committees. He further held various offices in Western's wholly-owned subsidiaries, including Westwood Mortgage Company and WS Service Corporation.

Pursuant to his domination and control of Western, Woods dramatically changed its policies and practices. Western aggressively began to pursue complex commercial ventures that often were based upon unsafe and unsound underwriting practices. Western's commercial real estate transactions generated paper profits, making Western appear solvent. The FDIC further alleges that Woods made false entries in Western's books with intent to deceive Western's board and government regulators, and he conspired to misapply Western's funds. The FDIC claims these policies were part of a scheme by Woods to defraud

59TH CASE of Level 1 printed in FULL format.

ROBERT CASTRO, JR., et al., Plaintiffs, v. PAINEWEBBER, INC., et al., Defendants.

Case No. 94-CV-65 and 94-CV-256 (Consolidated)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION

866 F. Supp. 315; 1994 U.S. Dist. LEXIS 15783

October 5, 1994, Decided Nun Pro Tunc

October 5, 1994, Filed

COUNSEL: [**1] For ROBERT CASTRO, JR, RAYE CASTRO, ALL PLAINTIFFS, CARL HANKS, DANIEL DOIRON, LYNDA DOIRON, ROBERT FALGOUT, HARLAN HARRISON, PEGGY HARRISON, EDWARD KENNEDY, CAROL KENNEDY, JOHN MCCLELLAND, LYNDA MCCLELLAND, WILLIAM MOORHEAD, BRENDA MOORHEAD, W T STANFORD, TOMMIE MAE STANFORD, ROY A WHITE, CAROLYN WHITE, JAMES WISE, SR, BETTY JANE WISE, JOHN T CAMPBELL, SAMUEL NUCHIA, GEORGE ANN NUCHIA, plaintiffs: Michael A Havard, Richard Lyle Coffman, Provost & Umphrey, Beaumont, TX, Jefferson. Michael S Burg, Attorney at Law, Houston, TX.

For EDNA C MATTOX, LARRY GENE COCHRAN, ERIS ELIZABETH COCHRAN, THOMAS J BARLAND, GERALDINE Y BARLAND, FRANK A JOHNSTON, LINDA K JOHNSTON, consolidated plaintiffs: Richard Lyle Coffman, Provost & Umphrey, Beaumont, TX, Jefferson.

For PAINEWEBBER INC, PAINEWEBBER GROUP INCORPORATED, REGIONAL S&L INVESTORS, INCORPORATED, defendants: J Hoke Peacock, II, Orgain Bell & Tucker, Beaumont, TX, Jefferson. Mitchell A Karlan, Gibson Dunn & Crutcher, New York, NY. For ESSEX FINANCIAL GROUP INCORPORATED, LAWRENCE N SMITH, defendants: Robert L O'Donnell, Vandeventer Black Meredith & Martin, Norfolk, VA. For ESSEX FINANCIAL PARTNERS, L P, defendant: John G Bissell, Strong [**2] Pipkin Nelson & Bissell, Beaumont, TX, Jefferson. James J Wheaton, Willcox & Savage PC, Norfolk, VA. For ERNST & YOUNG, defendant: Robert G Cohen, Ernst & Young, New York, NY, Ralph I Miller, Weil Gotshal & Manges, Dallas, TX, Dallas.

For WILLIAM BUCHALTER, SCOTT WINTER, consolidated defendants: J Hoke Peacock, II, Orgain Bell & Tucker, Beaumont, TX, Jefferson.

For CHARLES W TUPPER, BETTY R TUPPER, CECIL BROUSSARD, WINNIE BROUSSARD, plaintiffs: Michael A Havard, Richard Lyle Coffman, Provost & Umphrey, Beaumont, TX, Jefferson. Michael S Burg, Attorney at Law, Houston, TX.

JUDGES: SCHELL

OPINIONBY: RICHARD A. SCHELL

OPINION: [*316] MEMORANDUM OPINION AND ORDER

This opinion and order addresses an on-the-record objection to a proposal that certain class members receive additional cash compensation. The objection might not be unusual were it to have come from defense counsel; here, however, it is urged by the firm of Provost * Umphrey, Plaintiffs' counsel in this matter. For the reasons which follow, it is OVERRULED.

BACKGROUND

The instant class-action securities litigation owes its existence to the ill-fated Essex Financial Partners, L.P. ("Essex"). Although, as shall be explained later, the majority of argument [**3] in this case has involved the merits of the settlement of the action instead of the merits of the action itself, a brief explanation of preceding events may be helpful.

a. High hopes

Defendant PaineWebber began offering Limited Partnership Units ("LPUs") in Essex to the public in August of 1989. The price was $ 20/LPU. n1 Essex hoped to cash in on then-recent developments in the banking industry by cheaply acquiring a series of banks (beginning with Essex Savings Bank) and then reselling them at a profit five to seven years thereafter. n2 Essex' initial public offering involved the issuance of 2,078,382 LPUs.

7TH CASE of Level 1 printed in FULL format.

STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff-Appellee, -vs- PHILIP J. GOMEZ; DOUGLAS J. O'CONNOR, Defendants-Appellants. STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff-Appellant, -vs- PHILIP J. GOMEZ; DOUGLAS J. O'CONNOR; ERNST & WHINNEY, Defendants-Appellees.

No. 94-56380, No. 94-56381

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1996 U.S. App. LEXIS 18482

February 6, 1996 *, Submitted, Pasadena, California

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

July 23, 1996, FILED

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 92 F.3d 1192, 1996 U.S. App. LEXIS 28156.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of California. D.C. No. CV-87-00067-MLH. Marilyn L. Huff, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: For STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff - Appellee (94-56380): Dennis Stewart, Esq., Theodore J. Pintar, MILBERG WEISS BERSHAD HYNES & LERACH LLP., San Diego, CA.

PHILIP J. GOMEZ, Defendant - Appellant (94-56380), Pro se, Incline Village, NV.

DOUGLAS J. O'CONNOR, Defendant - Appellant (94-56380), Pro se, Huntington Beach, CA.

For STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff - Appellant (94-56381): Leonard B. Simon, Esq., Dennis Stewart, Esq., Theodore J. Pintar, MILBERG WEISS BERSHAD HYNES & LERACH LLP., San Diego, CA.

For ERNST & WHINNEY, Defendant - Appellee (94-56381): Kathryn A. Oberly, Esq., ERNST & YOUNG, Washington, DC. Peter H. Benzian, Esq., LATHAM & WATKINS, San Diego, CA. Daniel M. Gray, ERNST & YOUNG LLP, Washington, DC.

DOUGLAS [*2] J. O'CONNOR, Defendant - Appellee (94-56381), Pro se, Huntington Beach, CA.

PHILIP J. GOMEZ, Defendant - Appellee (94-56381), Pro se, Incline Village, NV.

JUDGES: Before: WALLACE, FERGUSON, and T.G. NELSON, Circuit Judges.

OPINION: MEMORANDUM

Gomez and O'Connor appeal from a general jury verdict holding them liable for violating the securities laws. This disposition resolves solely the issues raised by Gomez and O'Connor in their pro se appeal. The district court had jurisdiction pursuant to 15 U.S.C. § 78aa and 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

A district court's evidentiary rulings are reviewed for an abuse of discretion and should not be reversed absent some prejudice. Roberts v. College of the Desert, 870 F.2d 1411, 1418 (9th Cir. 1988). Gomez and O'Connor incorrectly argue that they were denied a fair trial because the jury was unable to

1ST CASE of Focus printed in FULL format.

STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff-Appellee, v. ERNST & WHINNEY, Defendant-Appellant. STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff-Appellee, v. PHILIP J. GOMEZ; DOUGLAS J. O'CONNOR, Defendants-Appellants. STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. PHILIP J. GOMEZ; DOUGLAS J. O'CONNOR; ERNST & WHINNEY, Defendants-Appellees.

No. 94-56379, No. 94-56380, No. 94-56381

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

90 F.3d 1431; 1996 U.S. App. LEXIS 18145; Fed. Sec. L. Rep. (CCH) P99,282; 96 Cal. Daily Op. Service 5415; 96 Daily Journal DAR 8834

February 6, 1996, Argued, Submitted, (94-56379), February 6, 1996, Submitted, (94-56380 & 94-56381) * Pasadena, California

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

July 23, 1996, Filed

PRIOR HISTORY: [**1] Appeals from the United States District Court for the Southern District of California. D.C. No. CV-87-00067-MLH. Marilyn L. Huff, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: Peter H. Benzian, Latham & Watkins, San Diego, California; Daniel M. Gray, Ernst & Young, Washington, D.C., for the defendant-appellant-cross-appellee.

Leonard B. Simon and Dennis Stewart, Milberg Weiss Bershad Hynes & Lerach, San Diego, California, for the plaintiff-appellee- cross-appellant.

Douglas J. O'Connor, pro se, Huntington Beach, California, defendant-appellant-cross-appellee.

Philip J. Gomez, pro se, Incline Village, Nevada, defendant- appellant-cross-appellee.

JUDGES: Before: J. Clifford Wallace, Warren J. Ferguson, and Thomas G. Nelson, Circuit Judges. Opinion by Judge Wallace.

OPINIONBY: WALLACE

OPINION: [*1433] OPINION

WALLACE, Circuit Judge:

Ernst & Whinney appeals from a general jury verdict in favor of the plaintiff class (Knapp). Knapp cross-appeals from the district court's denial of prejudgment interest and the dismissal of various state-law causes of action. The district court had jurisdiction pursuant to 15 U.S.C. § 78aa and 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant [**2] to 28 U.S.C. § 1291. We affirm.

I

ATV Systems, Inc. (ATV) was founded by Philip Gomez, Douglas O'Connor, and Frank Gleason in 1981. The company specialized in point-of-sale microprocessing systems designed for retail applications and also dealt in more generalized data processing and communications equipment for office use. The principals had been involved in the high-tech [*1434] field and considered themselves well-versed in "turnaround" techniques. They were experienced in taking troubled companies, slashing waste, increasing productivity, improving the bottom line, and turning the companies into profitable enterprises. There were many businesses in need of such redirection in the early 1980s because interest rates were high and credit was tight. ATV's business plan was to acquire bankrupt companies at bargain prices, liquidate un-

5TH CASE of Level 1 printed in FULL format.

BERNARD FIDEL; JOE BINDER, in their capacity as proposed intervenors, Plaintiffs-Appellants, and, JOHN GLAVARIS; PATRICIA GLAVARIS; BENNY L. TOLLEY, Plaintiffs, v. HERBERT J. YOUNG; JAMES A. THAYER; JAY JANIS; JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K.S BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE HUTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR SAVINGS, F.A. MELVIN RIFKIND, et al.; KPMG PEAT MARWICK; GIBSON, DUNN & CRUTCHER; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H.DUDLEY; RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM; RESOLUTION TRUST CORPORATION, Defendants-Appellees.

No. 95-55926

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1996 U.S. App. LEXIS 24422

August 7, 1996, Argued and Submitted, Pasadena, California

September 16, 1996, FILED

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 97 F.3d 1459, 1996 U.S. App. LEXIS 38307.

PRIOR HISTORY: Appeal from the United States District Court for the Central District of California. D.C. No. CV-90-6185-MRP. Mariana R. Pfaelzer, District Judge, Presiding.

DISPOSITION: Fidel's appeal dismissed for lack of jurisdiction.

COUNSEL: For BERNARD FIDEL, Plaintiff - Appellant: Robert H. Bretz, Esq., Marina Del Rey, CA.

For JOE BINDER, in their capacity as proposed intervenors, Plaintiff - Appellant: Robert H. Bretz, Esq., (See above).

For HERBERT J. YOUNG, Defendant - Appellee: Rory M. Hernandez, Esq., Martin C. Washton, Esq., Edward Perez, Legal, GIBSON, DUNN & CRUTCHER, Los Angeles, CA.

For JAMES N. THAYER, JAY JANIS; JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K.S. BLOUNT; ROBERT R. SPRAGUE HOUSTON I. FLOURNOY; BERNICE HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR SAVINGS, F.A.; MELVIN RIFKIND, et al., Defendant - Appellee: Rory M. Hernandez, Esq., (See above). Martin C. Washton, Esq., (See above). Stephen A. Kroft, Esq., McDERMOTT, WILL & EMERY, Los Angeles, [*2] CA.

For KPMG PEAT MARWICK, Defendant - Appellee: Ralph J. Shapira, Esq., Diane E. Pritchard, Esq., O'MELVENY & MYERS, Los Angeles, CA.

For GIBSON, DUNN & CRUTCHER LLP, Defendant - Appellee: Stephen A. Kroft, Esq., (See above).

For ERNST & WHINNEY, Defendant - Appellee: Rory M. Hernandez, Esq., (See above). Elizabeth W. Walker, Esq., PAUL, HASTINGS, JANOFSKY & WALKER, Los Angeles, CA.

For ERNST & YOUNG, Defendant - Appellee: Rory M. Hernandez, Esq., (See above). Elizabeth W. Walker, Esq., (See above).

For WILLIAM H. DUDLEY, Defendant - Appellee: Elizabeth W. Walker, Esq., (See above).

For RESOLUTION TRUST CORPORATION, as Receiver for Gibralter Savings, Defendant - Appellee: Harold G. Becks, Esq., WILSON & BECKS, Los Angeles, CA.

For MELVIN RIFKIND, Defendant - Appellee: Carey B.

MARTINDALE-HUBBELL LIST OF CLIENTS - ERNST & YOUNG

DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN

FOCUS - 5 OF 5 LISTINGS

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MARTINDALE-HUBBELL (R) LAW DIRECTORY

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STATEMENT OF PRACTICE: Banking and Finance, Bankruptcy, Commercial Litigation, Corporate Law and Securities, Employee Benefits, Employment Relations, Energy, Environmental, Estate Planning/Probate, Immigration, Intellectual Property, Products Liability, Public Finance, Real Estate, Taxation.

... Pont de Nemours; Elf Atochem North America, Inc.; Emerson Electric Co.; Environmental Research Institute of Michigan; Ernst & Young; FANUC Robotics North America, Inc.; Federal-Mogul Corporation; Florists' Transworld Delivery Association; Ford Motor Company; ...

Case Western Reserve University (J.D., 1993). National Moot Court; Order of the Barristers. Recipient: American Jurisprudence Award in Oral Advocacy; Dean Dunmore Moot Court Award. Member: Ohio State (Member, Labor and Employment Law Section) and American (Member, Labor and Employment Law Section) Bar Associations; State Bar of Texas (Member, Labor and Employment Law Section). Practice Areas: Labor and Employment; Commercial Litigation. Email: amy_martin%Dickinson-Wright@notes.worldcom.com

JEFFREY E. THOMPSON. Position: Associate. Born Tacoma, Washington, March 6, 1968; admitted to bar, 1993, Michigan. Education: Northwestern University (B.A., 1990); University of Illinois (J.D., 1993). Member, University of Illinois Law Review. Author: "Damage Caused By Reintroduced Wildlife: Should The Government Be Held Accountable?" Vol. 1992 U. Ill. L. Rev. 1183. Member: State Bar of Michigan. Email: jeffrey_thompson%Dickinson-Wright@notes.worldcom.com

REPRESENTATIVE CLIENTS: American Seating Company; Ameritech International; Ameritech Publishing, Inc.; Arthur Andersen & Co.; Autocam Corporation; Automobile Club of Michigan; Barden Cablevision; Chrysler Corporation; Chrysler Credit Corporation; Chrysler Financial Corporation; City of Grosse Pointe Farms; County of Grand Traverse; Classic Chevrolet, Inc.; Cranbrook Educational Community; Deloitte & Touche; Du Pont de Nemours; Elf Atochem North America, Inc.; Emerson Electric Co.; Environmental Research Institute of Michigan;

Ernst & Young; FANUC Robotics North America, Inc.; Federal-Mogul Corporation; lorists' Transworld Delivery Association; Ford Motor Company; General Motors orporation; Gerber Products Company; Goodyear Tire & Rubber Co.; Henry Ford ommunity College; Herb Ritsema Company; Hobart Corp.; InsurAmeriCorp; nterflora, Inc.; Johnson & Johnson; Kamax-Werke Rudolf Kellerman Gmgh & Co.; mart Corporation; Kuhlman Corporation; Letts Industries, Inc.; Mallinckrodt nc.; Mellon Bank, N.A.; Melon-McMahon Real Estate Advisors Inc.; Michigan onsolidated Gas Co.; Michigan Health Care Corporation; Miller Brewing Co.; inistry of Privatization of the Republic of Poland; NBD Bank; Nippondenso merica, Inc.; Nissan Research and Development, Inc.; Northwest Airlines; akland Community College; Oakland University; Olde Financial Corporation; ioneer Incorporated; Polish Development Bank; Premark International; Quality omputers, Inc.; Republic Bancorp, Inc.; Riviera Die & Tool, Inc.; Ross Roy ommunications; Schulers, Inc.; Suburban Mobility Authority Regional ransportation (SMART); Suzuki Motor Co., Ltd.; The Empire Company, Inc.; The armon Group, Inc.; Thiokol Corp.; Travel Consultants, Inc.; University of etroit Mercy; UNO-VEN; W.R. Grace & Co.; W.Y. Campbell & Co.

For complete biographical data on all personnel, see Professional Biographies t Detroit, Michigan)

Kathryn A. (Kay) Oberly, Ernst & Young L.L.P., New York

She Insists on ADR, Firm Ties, Honesty

AGE: 46

TITLE: Vice chair and general counsel

DEPUTIES: Robert G. Cohen (litigation); Douglas M. Galin (corporate and transactional matters); John E. Matson (accounting and auditing counseling).

THE BUSINESS: Ernst & Young is one of the "big six" accounting firms; it bills itself as "the largest integrated professional services firm in the nation." It had 1996 revenues of $3.57 billion and employed 23,000 people in 112 U.S. offices. (Ernst & Young International has revenues in excess of $7 billion and employs more than 72,000 in 134 countries.) E&Y audits 117 of the Fortune 500 companies and is the leading provider of tax services in the United States.

SIZE OF DEPARTMENT: 117 employees in total; 28 lawyers and 17 auditors. The lawyers are located in New York (17), Los Angeles (6) and Washington, D.C. (5). The auditors live in seven different cities, traveling to wherever litigation is pending.

STRUCTURE OF DEPARTMENT: "The lawyers are divided, somewhat loosely, into three general groups: litigation; corporate and transactional; and human resources and employment."

PRIMARY OUTSIDE COUNSEL: "We use a number of different firms around the country, depending on various factors such as the need for

[SEE 'OBERLY' PAGE B3]

THE NATIONAL LAW JOURNAL, MONDAY, FEBRUARY 17, 1997 - B1

With Outside Counsel, Relationships Are Key

['OBERLY' FROM PAGE B1]
litigation counsel in the jurisdiction we're in or the need for specialized expertise such as intellectual property law. In general though, we have a few firms around the country with which we have long-term relationships and we tend to use those firms most often. They are Mayer, Brown & Platt [Chicago and Washington, D.C.]; Davis Polk & Wardwell [New York]; Heller Ehrman White & McAuliffe [West Coast]; and Latham & Watkins [West Coast]." Overseas, the company uses Baker & McKenzie at several of its locations.

ROUTE TO THE TOP: Ms. Oberly received her bachelor's degree in political science from the University of Wisconsin at Madison. She clerked for Judge Donald P. Lay of the 8th U.S. Circuit Court of Appeals. After her clerkship, she joined the U.S. Department of Justice, where she spent 12 years as an appellate litigator and argued 12 cases before the U.S. Supreme Court. In 1986 she became a partner in the D.C. office of Mayer, Brown & Platt. After five years of appellate litigation practice, Ms. Oberly joined her client Ernst & Young as associate general counsel. She opened E&Y's D.C. office to handle appellate litigation and "special projects." In October 1994, Ms. Oberly was promoted to her current post.

CAREER HIGHLIGHT: While at Mayer Brown and in her first year at Ernst & Young, Ms. Oberly argued and won (7-2) a landmark insurance case before the Supreme Court. *Reves v. Ernst & Young* (1993) held that "for the most part RICO claims cannot be brought against accountants who are just performing services for their clients...The language of the statute doesn't stretch to cover the outside adviser as opposed to the people actually managing the business." Says Ms. Oberly: "Prior to that case, we—I don't mean Ernst & Young but accounting firms generally—would frequently see RICO claims being included in complaints, and, of course, they were included because RICO includes treble damages, and it would boost what plaintiffs perceived to be the settlement value of the case just by the threat of treble damages. We have

> Globalization has meant E&Y's legal department is busy learning new forms of doing business in new places.

OTHER CHANGES: Ms. Oberly cut her department by some 32 lawyers but has recently added a few corporate/transactional lawyers. Now, she says, "We have our legal department at the right size and right mix of different skills."

Ms. Oberly says E&Y's growth into new areas has been her "greatest challenge" since "my background is in litigation...We're the first of the big six firms to have an online subscription service. It's called Ernie, and it is available to subscribers to answer their tax questions. We also have one of the largest healthcare consulting practices in the country with 200 doctors and nurses on our staff. Also, with globalization, we in the legal department have had to get up to speed and hopefully ahead of the curve in new forms of doing business in new places."

ON MARKETING: "I tend to hire lawyers I already know and have already worked with...The lawyers I go back to are really an adjunct of my department and they work with us so closely that I can pick up the phone and call one of them just as comfortably as I can call somebody within the department. It is hard if not impossible for someone who's making the sales pitch to get to that stage."

PET PEEVES: Her "cosmic" pet peeve is the civil justice system's inefficiency. "I don't think you see this until you are inside counsel. But our system is one of the most costly and cumbersome ways of resolving disputes anybody could devise...[L]awyers as a profession should work on ways to make the resolution of legal disputes more like business deals...My small-scale pet peeve is with the law firms that don't read the billing protocol. [Our] protocol specifies that if a firm wants to request an increase in its billing rates they will provide us with 60 days' notice...[But some firms] think that they can just surreptitiously raise their billing rates by sending us an invoice with higher rates...It is particularly galling when you're an accounting firm to have the firms think that you won't notice!...[W]e don't...use that firm again."

LEGISLATIVE ACTIVITIES: "The accounting profession...worked very hard

THE NATIONAL LAW JOURNAL, MONDAY, FEBRUARY 17, 1997 - B3

BEST AVA

Department of Justi[ce] where she spent 12 years as an appe[llate] litigator and argued 12 cases before the U.S. Supreme Court. In 1986 she became a partner in the D.C. office of Mayer, Brown & Platt. After five years of appellate litigation practice, Ms. Oberly joined her client Ernst & Young as associate general counsel. She opened E&Y's D.C. office to handle appellate litigation and "special projects." In October 1994, Ms. Oberly was promoted to her current post.

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Globalization has meant E&Y's legal department is busy learning new forms of doing business in new places.

ON PRIVATE PRACTICE: "I enjoyed it. There are parts...I miss—the ability to work really intensely on one case, writing the brief or preparing for an argument...I find that the job of general counsel has me doing so many things, I can't drop 90 percent of them in order to focus on just one. On the other hand, I don't miss the marketing and sales aspect of private practice. It certainly intensified while I was in private practice and in recent years, though maybe it's flattening out a little bit. But the pressure to bring in business is something that is a distraction from practicing law, and I don't think there is any partner in any firm who is immune from the transformation of the profession into a sales and marketing culture."

INNOVATION: Before Ms. Oberly became general counsel at Ernst & Young, the accounting firm had a reputation for fighting every lawsuit, and it had a relatively large in-house team. Ms. Oberly has been a staunch proponent of alternative dispute resolution. Her contracts with clients call for nonbinding mediation in the event of a dispute and, if that is unsuccessful, then binding arbitration.

already know and have already worked with...The lawyers I go[to] to are really an adjunct of my department and they work with us so closely that I can pick up the phone and call one of them just as comfortably as I can call somebody within the department. It is hard if not impossible for someone who's making the sales pitch to get to that stage."

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LEGISLATIVE ACTIVITIES: "The accounting profession...worked very hard for the passage of the Private Securities Litigation Reform Act of 1996." As for the controversial "whistleblower" or fraud detection sections of the act, Ms. Oberly says they will make little difference in obligations of accountants.
"It's always been the obligation of accountants to plan their audit in a way that will, if possible, find irregularities...But if what you really need done is a forensic audit, then that is not a standard financial statement audit...If you have sophisticated fraudfeasors bent on pulling off a scheme, they can fool the auditors."

PROFESSIONAL ACTIVITIES: Member of the American Law Institute; the American Bar Association's General Counsel Committee and the American Corporate Counsel Association.

FAMILY: Ms. Oberly, who commutes to her office in New York, lives in Washington, D.C., with her teen-age son, Michael.

SPORTS/HOBBIES: "Lots of time on the treadmill with Books on Tape to kill the monotony." Swimming and skiing. Reading, cooking.

LATEST BOOK READ: Stephen Frey's financial thriller, "The Vulture Fund." NLJ

ILABLE COPY

15TH CASE of Level 1 printed in FULL format.

ED PLAUT; his wife, NANCY MCHARDY PLAUT; JOHN GRADY, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. SPENDTHRIFT FARM, INC.; BATEMAN EICHLER, HILL RICHARDS, INC.; FRANCIS M. WHEAT; GIBSON, DUNN & CRUTCHER; DELOITTE, HASKINS & SELLS; NORMAN D. OWENS; AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC., Defendants-Appellees.

No. 92-5591

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1 F.3d 1487; 1993 U.S. App. LEXIS 19738; Fed. Sec. L. Rep. (CCH) P97,684

March 1, 1993, Argued

August 3, 1993, Decided

August 3, 1993, Filed

SUBSEQUENT HISTORY: [**1] Rehearing En Banc Denied October 14, 1993, Reported at: 1993 U.S. App. LEXIS 27485.

PRIOR HISTORY: On Appeal from the United States District Court for the Eastern District of Kentucky. District No. 87-00438. Joseph M. Hood, District Judge.

DISPOSITION: AFFIRMED

COUNSEL: For ED PLAUT, his wife, NANCY MCHARDY PLAUT, JOHN GRADY, on behalf of themselves and all others similarly situated, Plaintiffs - Appellants: J. Montjoy Trimble, ARGUED, BRIEFED, 606-259-0523, Trimble & Bowling, 163 W. Short Street, Suite 610 Central Bank Building, Lexington, KY 40507.

For SPENDTHRIFT FARM, INC., Defendant - Appellee: Richard C. Ward, 606-233-2012, David C. Long, 606-233-2012, Barbara Edleman, BRIEFED, 606-255-6676, Glenn C. Van Bever, ARGUED, Wyatt, Tarrant & Combs, 250 W. Main Street, Suite 1700 Lexington Financial Center, Lexington, KY 40507-1732. For BATEMAN EICHLER, HILL RICHARDS, INC., Defendant - Appellee: Guy R. Colson, Senior Partner, 606-252-6731, Fowler, Measle & Bell, 4-A Bank One Plaza, Lexington, KY 40507-1680. Elizabeth S. Feamster, 606-252-6731, Bank One Plaza, Fourth Floor, Lexington, KY 40507-1680. James E. Burns, Jr., 415-442-0900, John Missing, 415-442-0900, Kevin P. Muck, BRIEFED, 415-442-0900, Brobeck, Phleger & Harrison, 1 Market Plaza, Spear Street Tower, San Francisco, CA 94105. For FRANCIS M. WHEAT, GIBSON, DUNN & CRUTCHER, Defendants - Appellees: Robert M. Watt, III, BRIEFED, 606-231-3000, J. David Smith, Jr., 606-231-3000, Stoll, Keenon & Park, 201 E. Main Street, Suite 100 First Security Plaza, Lexington, KY 40507-1380. William E. Johnson, 502-875-6000, Stoll, Keenon & Park, 326 W. Main Street, Frankfort, KY 40601. For DELOITTE, HASKINS & SELLS, Defendant - Appellee: L. Clifford Craig, ARGUED, BRIEFED, 513-381-2838, Taft, Stettinius & Hollister, 425 Walnut Street, Suite 1800 Star Bank Center, Cincinnati, OH 45202. Peter L. Ecabert, Deloitte, Haskins & Sells, 1633 Broadway, Suite 6, New York, NY 10019-6753. Robert B. Craig, BRIEFED, 606-331-2838, Taft, Stettinius & Hollister, 2670 Chancellor Drive, Suite 400 Thomas More Center, Crestview Hills, KY 41017. For NORMAN D. OWENS, AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC., Defendants - Appellees: Michael D. Meuser, Frank T. Becker, 606-255-6676, Harry B. Miller, Jr., 606-255-6676, Robert S. Miller, ARGUED, BRIEFED, 606-255-6676, Miller, Griffin & Marks, 271 W. Short Street, Suite 700 Security Trust Building, Lexington, KY 40507-1292.

For UNITED STATES OF AMERICA, Amicus Curiae: Scott R. McIntosh, BRIEFED, 202-514-4052, U.S. Department of Justice, Appellate Division, Tenth & Pennsylvania Avenue, N.W., Suite 3129 Main Justice Building, Washington, DC 20530. Barbara C. Biddle, 202-514-2541, Room 7124, U.S. Department of Justice, Appellate Staff, Civil Division, Tenth & Pennsylvania

Avenue, N.W., Suite 3631 Main Justice Building, Washington, DC 20530. Mark B. Stern, ARGUED, 202-514-5089, U.S. Department of Justice, Civil Division, 10th & Pennsylvania Avenues, N.W., Suite 7410A, Washington, DC 20530. For SECURITIES AND EXCHANGE COMMISION, Amicus Curiae: Scott R. McIntosh, BRIEFED, 202-514-4052, U.S. Department of Justice, Appellate Division, Tenth & Pennsylvania Avenue, N.W., Suite 3129 Main Justice Building, Washington, DC 20530. Barbara C. Biddle, 202-514-2541, Room 7124, U.S. Department of Justice, Appellate Staff, Civil Division, Tenth & Pennsylvania Avenue, N.W., Suite 3631 Main Justice Building, Washington, DC 20530. For ARTHUR ANDERSEN & COMPANY, ERNST & YOUNG, KPMG PEAT MARWICK AND PRICE WATERHOUSE, ERNST & YOUNG, KPMG, PRICE WATERHOUSE AND COMPANY, Amicus Curiae: Kathryn Oberly, BRIEFED, 202 663-9871, 1200 19th Street N.W., Fourth Floor, Washington, DC 20036.

JUDGES: Before: KEITH and BATCHELDER, Circuit Judges; and CHURCHILL, Senior District Judge. * BATCHELDER, Circuit Judge, delivered the opinion of the court, in which CHURCHILL, Senior District Judge, joined. KEITH, Circuit Judge, delivered a separate opinion concurring in part and dissenting in part.

* The Honorable James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINIONBY: ALICE M. BATCHELDER

OPINION: [*1489] ALICE M. BATCHELDER, Circuit Judge.

I.

Appellants, the plaintiffs before the District Court, representing a large number of sometime investors, originally sued defendants on November 25, 1987, alleging violations of the securities laws, namely fraud and deceit in the sale of stock under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") n1 and Securities and Exchange Commission Rule 10b-5. n2 Defendants owned "one of the Commonwealth's premier thoroughbred horse farms" (the District Court's characterization, to which we owe every deference) and issued stock in the enterprise in order to raise some thirty million dollars in cash; [**2] others of the named defendants were various legal and financial advisers to the venture. The appellants (or "shareholders") originally purchased their stock when defendants offered it for public sale in 1983.

n1 15 U.S.C. § 78j.

n2 17 C.F.R. § 240.10b-5.

For over three years, the pretrial litigation in the District Court proceeded apace. On June 20, 1991, however, the Supreme Court handed down Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991), which applied a uniform Federal time limit from another section of the 1934 Act to that action and all private § 10(b) actions. Lampf provided a three year period of repose, running from the date of a fraudulent securities contract of sale, or a one year limitation period, running from the date of discovery of the fraud. n3

n3 Prior to Lampf, the Kentucky Blue Sky law provided a three year limitation period for this type of Federal securities action, running from the date of discovery. Ky. Rev. Stat. Ann. § 292.480. Two Circuits had already adopted the Federal one year/three year period adopted in Lampf; others had applied State limitations periods. See Lampf, 111 S. Ct. at 2777 n.1 (citing cases).

[**3]

The District Court, applying Lampf retroactively on the authority of Beam Distilling Corp. v. Georgia, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991), which was announced the same day as Lampf, dismissed the shareholders' claims with prejudice on August 13, 1991. The shareholders did not file what they believed (correctly) would have been a meritless and indeed sanctionable appeal.

In November 1991, Congress passed the FDIC Improvement Act of 1991, ("1991 Act") which, on a plaintiff's motion made within sixty days of the effective date of the statute, December 19, 1991, required the District Courts to reinstate claims which had been [*1490] dismissed as a result of the application of the Federal statute of limitations announced in Lampf. The shareholders filed such a motion on February 11, 1992. While finding that under the statute the shareholders were entitled to have their claims reinstated, the District Court held the statute unconstitutional as applied and denied the motion. Since the portion of the 1991 Act which commands the District Court to reinstate the shareholders' dismissed cause of action violates the doctrine of separation of powers and deprives the defendants

14TH CASE of Level 1 printed in FULL format.

AXEL JOHNSON INC., Plaintiff-Appellee, v. ARTHUR ANDERSEN & CO., Defendant-Appellant, UNITED STATES OF AMERICA, Intervenor.

Docket No. 92-7624

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

6 F.3d 78; 1993 U.S. App. LEXIS 24954; Fed. Sec. L. Rep. (CCH) P97,766; 27 Fed. R. Serv. 3d (Callaghan) 627

December 21, 1992, Argued

September 27, 1993, Decided

SUBSEQUENT HISTORY: [**1] As Amended October 18, 1993.

PRIOR HISTORY: Defendant-appellant appeals the order of the United States District Court for the Southern District of New York, Morris E. Lasker, Judge, granting plaintiff-appellee's Fed. R. Civ. P. 60(b)(6) motion, vacating a judgment dismissing plaintiff-appellee's complaint asserting claims under 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5, and pendent state law claims, and reinstating plaintiff-appellee's complaint pursuant to 15 U.S.C. § 78aa-1.

DISPOSITION: Affirmed.

COUNSEL: SANFORD P. DUMAIN, New York, NY (Melvyn I. Weiss, Deborah Clark-Weintraub, Milberg Weiss Bershad Specthrie & Lerach, New York, NY, of counsel), for Plaintiff-Appellee.

ELIOT LAUER, New York, NY (Bernard V. Preziosi, Jr., Peter Sullivan, Curtis, Mallet-Prevost, Colt & Mosle, New York, NY, of counsel), for Defendant-Appellant.

KAY K. GARDINER, Assistant United States Attorney, New York, NY (Mary Jo White, United States Attorney for the Southern District of New York, Gabriel W. Gorenstein, Assistant United States Attorney, New York, NY, Barbara Biddle, Scott R. McIntosh, Appellate Staff, Civil Division, United States Department of Justice, Washington, [**2] D.C., of counsel), filed brief for the United States as intervenor and the Securities and Exchange Commission as amicus curiae in support of appellee.

THEODORE B. OLSON, Washington, D.C. (Theodore J. Boutros, Jr., John K. Bush, Gibson, Dunn & Crutcher, Washington, D.C., of counsel), filed a brief amicus curiae on behalf of Deloitte & Touche, Ernst & Young, and KPMG Peat Marwick.

JUDGES: Before: PIERCE, ALTIMARI, and WALKER, Circuit Judges.

OPINIONBY: WALKER

OPINION: [*79] WALKER, Circuit Judge:

This appeal presents a challenge to the constitutionality of Section 27A of the Securities and Exchange Act of 1934 (the "Act"), 15 U.S.C. § 78aa-1, as applied to reinstate plaintiff-appellee Axel Johnson Inc.'s ("Johnson") claims under § 10(b) of the Act, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5 against defendant-appellant Arthur Andersen & Co. ("Andersen"), which had been dismissed as untimely under the regime of Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991).

[*80] BACKGROUND

In a complaint filed in the United States District Court for the Southern District of New [**3] York (Lasker, J.) on September 29, 1989, Johnson asserted against Andersen § 10(b)/Rule 10b-5 claims, as well as pendent state law claims, related to Andersen's audit of a company Johnson purchased in December of 1982. Under the § 10(b)/Rule 10b-5 statute of limitations doctrine applicable in the Second Circuit when it filed its complaint, which borrowed state-law-fraud limitations periods, see Ceres Partners v. GEL Assocs., 918 F.2d 349, 352-53 (2d Cir. 1990),

20TH CASE of Level 1 printed in FULL format.

CERES PARTNERS, Plaintiff-Appellant, v. GEL ASSOCIATES, GOLLUST, TIERNEY and OLIVER, CONISTON PARTNERS, CONISTON INSTITUTIONAL INVESTORS, GOLLUST and TIERNEY INCORPORATED, KEITH R. GOLLUST, PAUL E. TIERNEY, Jr., and AUGUSTUS K. OLIVER, Defendants-Appellees

No. 390, Docket 89-7666

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

918 F.2d 349; 1990 U.S. App. LEXIS 19741; Fed. Sec. L. Rep. (CCH) P95,639

December 1, 1989, Argued

November 8, 1990, Decided

PRIOR HISTORY:

[**1] Appeal from an order of the United States District Court for the Southern District of New York, Milton Pollack, Judge, dismissing claims for damages under §§ 14(d), 14(e), and 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78n(d), 78n(e), and 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, on the ground that the claims are barred by the statute of limitations. See 714 F. Supp. 679 (1989).

DISPOSITION: Affirmed.

COUNSEL: Evan L. Gordon, New York, New York (Bangser & Weiss, New York, New York, on the brief), for Plaintiff-Appellant.

Richard F. Ziegler, New York, New York (Thomas G. Dagger, Michael S. Sommer, Cleary, Gottlieb, Steen & Hamilton, New York, New York, on the brief), for Defendants-Appellees.

Daniel L. Goelzer, General Counsel of the Securities and Exchange Commission, Washington, District of Columbia (Jacob H. Stillman, Associate General Counsel, Thomas L. Riesenberg, Assistant General Counsel, Rada L. Potts, Attorney, Paul Gonson, Solicitor, Washington, District of Columbia, of Counsel), filed a brief for Amicus Curiae Securities and Exchange Commission in support of Appellant.

Patricia A. McGovern, Harris J. Amhowitz, Leonard P. Novello, Eldon Olson, New York, New York (Carl D. Liggio, New York, New [**2] York, of Counsel), filed a brief for Amici Curiae Ernst & Young, Coopers & Lybrand, Peat Marwick Main & Co., and Price Waterhouse, in support of Appellees.

JUDGES: Kearse, Altimari, and Mahoney, Circuit Judges.

OPINIONBY: KEARSE

OPINION: [*350] KEARSE, Circuit Judge

Plaintiff Ceres Partners ("Ceres") appeals from an order of the United States District Court for the Southern District of New York, Milton Pollack, Judge, summarily dismissing its complaint for damages against defendants GEL Associates ("GEL"), et al., for violation of §§ 10(b), 14(d), and 14(e) of the Securities Exchange Act of 1934, as amended by the Williams Act, Pub. L. No. 90-439, § 3, 82 Stat. 455 (1968) (collectively "1934 Act" or "Act"), 15 U.S.C. §§ 78j(b), 78n(d), and 78n(e) (1988), and Securities and Exchange Commission ("SEC") Rule 10b-5, 17 C.F.R. § 240.10b-5 (1989). Borrowing the statute-of-limitations period that would be applied to such claims in accordance with New York law, the district court found that Ceres's claims were time-barred. 714 F. Supp. 679 (1989). On appeal, all of the parties urge us to abandon this Circuit's established rule that the statute of limitations applicable to claims under §§ 10(b) [**3] and 14 of the 1934 Act is that provided by the most analogous state statute, and instead to adopt a uniform federal limitary period on such claims. They disagree, however, on what period should be selected. Ceres contends that a five-year period should be selected, and that on this basis the judgment dismissing the complaint should be vacated. As discussed below, the judgment would be affirmed if we were to follow this Circuit's

128TH CASE of Level 1 printed in FULL format.

THE FLORIDA BAR RE: ADVISORY OPINION - NONLAWYER PREPARATION OF LIVING TRUSTS

No. 78,358

SUPREME COURT OF FLORIDA

613 So. 2d 426; 1992 Fla. LEXIS 2159; 18 Fla. Law W. S 23

December 24, 1992, Decided

SUBSEQUENT HISTORY: [**1] Rehearing Denied March 4, 1993. Released for Publication March 4, 1993.

PRIOR HISTORY: Original Proceeding - Rules Regulating The Florida Bar

COUNSEL: Joseph R. Boyd, Chairman, Standing Committee on UPL, of Boyd & Branch, Tallahassee, Florida; Lori S. Holcomb, Assistant UPL Counsel, The Florida Bar, Tallahassee, Florida; Janet E. Messervey, Vice-Chair, Standing Committee on UPL, Orlando, Florida; Rohan Kelley, Fort Lauderdale, Florida and Joseph W. Fleece of Belcher & Fleece, St. Petersburg, Florida, for The Real Property, Probate & Trust Law Section of The Florida Bar, for Petitioner.

Arthur J. England, Jr. of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida, for The American Institute of Certified Public Accountants, Florida Institute of Certified Public Accountants, Arthur Andersen & Co., Coopers & Lybrand, Deloitte & Touche, Ernst & Young, KPMG Peat Marwick and Price Waterhouse; Kenneth R. Hart of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, Florida, for The Florida Institute of Certified Public Accountants; J. Thomas Cardwell, Jr. and Virginia B. Townes of Akerman, Senterfitt & Eidson, Orlando, Florida, for The Florida Bankers Association; J. Robert [**2] McClure, Jr. of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Tallahassee, Florida, for The Florida Association of Life Underwriters; David R. McCallister, Wesley Chapel, Florida, for Family Living Trusts, Inc.; Will H. Halker, Jr. of Halker, Kelley & Sebben, Sacramento, California, for Living Trusts America, National Family Trusts and Mid-America Living Trust Associates, Inc.; Deborah M. Chalfie, Washington, D.C., for HALT; and James Konarske, owner of Jimmy K. & Associates, Zephyrhills, Florida, Interested Parties.

JUDGES: BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

OPINIONBY: PER CURIAM

OPINION:
[*426] PER CURIAM.

Pursuant to rule 10-7.1(b) of the Rules Regulating The Florida Bar, Ira C. Hatch, on behalf of American Family Living Trust, petitioned The Florida Bar Standing Committee on the Unlicensed Practice of Law (the Standing Committee) for an advisory opinion on the following question:

Whether it constitutes the unlicensed practice of law for a corporation or other nonlawyer to draft living trusts and related documents for another where the information to be included in the living trust is gathered by nonlawyer agents of the corporation or by the nonlawyer and she [**3] completed documents are reviewed by a member of The Florida Bar prior to execution.

[*427] We have jurisdiction to review the proposed advisory opinion pursuant to rule 10-7.1(g) of the Rules Regulating The Florida Bar and article V, section 15 of the Florida Constitution.

The Standing Committee received similar requests from a number of other parties, and responded by holding two hearings where both oral and written testimony were received. Following the hearings, the Standing Committee voted to issue the proposed opinion which finds that nonlawyer companies selling living trusts are engaging in the unlicensed practice of law and that the public is either actually being harmed or has the potential of being harmed by this practice.

The proposed opinion describes the process of creating a living trust as involving five steps: 1) gathering the necessary information; 2) assembling

133RD CASE of Level 1 printed in FULL format.

RICHARD'S AUTO CITY, INC., Plaintiff-Respondent, v. DIRECTOR, DIVISION OF TAXATION, Defendant-Appellant.

A-54 September Term 1994

SUPREME COURT OF NEW JERSEY

140 N.J. 523; 659 A.2d 1360; 1995 N.J. LEXIS 266

January 17, 1995, Argued

June 21, 1995, Decided

PRIOR HISTORY: [***1]

On certification to the Superior Court, Appellate Division, whose opinion is reported 270 N.J. Super. 92 (1994).

DISPOSITION: The judgment of the Appellate Division is reversed, and the order of the Tax Court, granting summary judgment in favor of the Director of the Division of Taxation, is reinstated.

SYLLABUS:

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

RICHARD'S AUTO CITY,INC. V. DIRECTOR,DIVISION OF TAXATION (A-54-94)

Argued January 17, 1995 - Decided June 21, 1995

HANDLER,J., writing for a unanimous Court.

The issue on appeal is whether certain provisions of the Corporation Business Tax Act (CBT), specifically N.J.S.A.54:10A-4(k), permit the net-operating losses in past tax years by a corporation that has been merged into a successor corporation to be carried over and deducted by the surviving corporation in a subsequent tax year. Also implicated is the validity of N.J.A.C.18:7-5.13(b),a regulation adopted [***2] by the Director of the Division of Taxation to implement the NOL carryover provisions of the CBT.

Richard's Auto City, Inc. (Auto City), a New Jersey corporation formed in 1973, is an automobile dealership in Freehold Township. Catena, Inc. (Catena), incorporated in 1983, was the leasing company affiliated with Auto City, providing lease financing for Auto City's customers. Catena began its operations in 1983 at the Auto City location. Richard Catena was the sole stockholder of each corporation. In January 1984, Richard Catena transferred 100% of his shares of stock in Catena to Auto City, making Catena a wholly-owned subsidiary of Auto City.

Over the next few years, Catena incurred substantial net-operating losses (NOLs), totalling $ 1,574,294, for the 1984, 1985, and 1986 tax years. In late 1986, pursuant to a plan of merger, Catena merged into Auto City. A Certificate of Merger filed with the Secretary of State on December 19, 1986 identified Auto City as the survivor corporation. Following the merger, the leasing programs that Catena previously offered continued in the same manner under Auto City's leasing department.

In its 1986 Corporate Business Tax Return, Auto City claimed [***3] as a deduction the NOLs Catena had incurred during the tax years prior to the merger. By notice of assessment dated April 17, 1989, the Director of the Division of Taxation disallowed the deduction and assessed Auto City $ 88,517 in additional taxes. The Director found that the losses actually had not been incurred by Auto City's business operations, but rather the losses were sustained by the merged corporation that no longer existed. The Director based his determination on administrative regulation, N.J.A.C. 18:7-5.13(b). The Director also imposed a late payment penalty and interest charges through November 30, 1989. The Director's decision was reaffirmed by a final determination letter dated November 16, 1989, which reduced the penalty and interest charges to the statutory minimum.

Auto City filed a complaint with the Tax Court contesting the Director's final determination. The Tax Court granted the Director's cross-motion for summary judgment and dismissed Auto City's complaint. On appeal, the Appellate Division reversed and remanded the matter to the Tax Court for entry of judgment in favor of Auto City. The Appellate Division found that the administrative regulation was [***4] invalid because it was inconsistent with the enabling statute, went beyond the legislative scheme, and imposed a restriction that was neither intended or authorized.

The Supreme Court granted the Director's petition for certification.

HELD: Net-operating losses incurred in past tax years by a corporation that has been merged into a successor corporation are not permitted, under the Corporation Business Tax Act, to be carried over and deducted by the surviving corporation in a subsequent tax year.

1. Agency regulations are presumptively valid and should not be invalidated unless they violate the enabling act or frustrate express or implied legislative intent. Courts generally accord substantial deference to the agency's interpretation of the statute the agency is charged with enforcing. Nonetheless, an administrative agency cannot extend a statute to give it a greater effect than its language permits. (pp. 4-7)

2. The language of the critical provisions of the CBT is not clear and unambiguous, does not admit of only one interpretation, and does not plainly authorize a surviving corporation in a merger to use the NOL deductions of an acquired corporation. By its express [***5] terms, N.J.S.A.54:10A-4(k)(6) does not address the treatment of NOLs in mergers and other corporate reorganizations. The Director's regulation comports with the basic meaning of the CBT. Nothing in the language of section 4(k)(6) permits one taxable entity to adopt the tax attributes of another entity alter a statutory merger. The language of the statute does not support the imputation of a legislative intent or the implication of statutory authority that would allow the transfer of tax deductions from an acquired corporation to the surviving corporation alter a merger. (pp 7-10)

3. A review of the legislative history of the CBT does not support the conclusion that the Legislature intended to authorize the deduction of an NOL by a corporation that did not sustain the loss simply because it acquired through merger the corporation that incurred the loss. In addition, the Court cannot conclude that the 1939 Internal Revenue Code, as interpreted and applied, shaped the Legislature's purpose in providing for a net loss carryover deduction. (pp. 10-19)

4. There is no reason to read the New Jersey Corporation Business Act, specifically N.J.S.A.14A:10.6 in pari materia (in [***6] conjunction) with the CBT, specifically section 4(k)(6). The two acts deal with different subjects (corporate law versus tax law), have different purposes, and are clearly not part of a single comprehensive plan. (pp. 19-23)

6. Auto City has failed to sustain its burden of proving that N.J.A.C. 18:7-5.13(b) is invalid. That regulation applies retroactively to the effective date of the CBT. Thus, the regulation applies, as the statute applies, to any taxable year ending alter June 30, 1984.

Judgment of the Appellate Division is REVERSED, and the order of the Tax Court, granting summary judgment in favor of the Director of the Division of Taxation, is REINSTATED.

CHIEF JUSTICE WILENTZ and JUSTICES POLLOCK, O'HERN, GARIBALDI, STEIN and COLEMAN join in JUSTICE HANDLER'S opinion.

COUNSEL: Margaret A. Holland, Deputy Attorney General, argued the cause for appellant (Deborah T. Poritz, Attorney General of New Jersey, attorney; Joseph L. Yannotti, Assistant Attorney General, of counsel).

Robert J. Kipnees argued the cause for respondent (Greenbaum, Rowe, Smith, Ravin & Davis, attorneys; Mr. Kipnees and Thomas C. Senter, of counsel and on the brief).

Michael A. Guariglia submitted [***7] a letter brief on behalf of amici curiae Ernst & Young, Coopers & Lybrand and Deloitte & Touche (McCarter & English, attorneys).

JUDGES: The opinion of the Court was delivered by HANDLER, J. CHIEF JUSTICE WILENTZ and JUSTICES POLLOCK, O'HERN, GARIBALDI, STEIN and COLEMAN join in JUSTICE HANDLER'S opinion.

OPINIONBY: HANDLER

OPINION: [*527]

13TH CASE of Level 1 printed in FULL format.

DAVID J. CHECKOSKY, NORMAN A. ALDRICH, PETITIONERS v. SECURITIES AND EXCHANGE COMMISSION, RESPONDENT; IN RE: APPLICATION OF DAVID J. CHECKOSKY AND NORMAN A. ALDRICH FOR THE PERPETUATION OF CERTAIN TESTIMONY AND THE PRESERVATION OF OTHER EVIDENCE; IN RE: DAVID J. CHECKOSKY AND NORMAN A. ALDRICH, PETITIONERS

No. 92-1396, No. 92-5158, No. 92-1214

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

23 F.3d 452; 1994 U.S. App. LEXIS 11735; Fed. Sec. L. Rep. (CCH) P98,229; 29 Fed. R. Serv. 3d (Callaghan) 300; 306 U.S. App. D.C. 144

October 26, 1993, Argued

May 20, 1994, Decided

PRIOR HISTORY: [**1] No. 92-1396, Petition for Review of an Order of the Securities and Exchange Commission. No. 92-5158, Appeal from the United States District Court for the District of Columbia. (92ms0103). No. 92-1214, On Petition for a Writ of Mandamus.

COUNSEL: Geoffrey F. Aronow argued the cause for petitioners. With him on the briefs was Andrew T. Karron. Jay Kelly Wright and Samuel A. Thumma entered an appearance.

Susan Ferris Wyderko, Assistant General Counsel, Securities and Exchange Commission, argued the cause for respondent. With her on the briefs were Paul Gonson, Solicitor, Richard M. Humes, Attorney, Paul P. Andrews, Senior Counsel, and Richard H. Walker, Regional Administrator, Securities and Exchange Commission. Jeffrey R. Zuckerman and Henry Klehm, III, Attorneys, Securities and Exchange Commission, entered an appearance in Nos. 92-5158 and 92-1214. James Robert Doty entered an appearance in No. 92-1396.

Kathryn A. Oberly was on the brief for amici curiae Arthur Andersen & Co.; Deloitte & Touche; Ernst & Young; and KPMG Peat Marwick.

Arthur F. Mathews and Michael R. Klein were on the brief for amicus curiae American Civil Liberties Union.

JUDGES: Before: SILBERMAN and RANDOLPH, [**2] Circuit Judges, and JOHN W. REYNOLDS, * District Judge.

* Of the United States District Court for the Eastern District of Wisconsin, sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion PER CURIAM. Circuit Judge SILBERMAN filed a separate opinion. Circuit Judge RANDOLPH filed a separate opinion. District Judge REYNOLDS filed a separate opinion, concurring in part and dissenting in part.

OPINIONBY: PER CURIAM; SILBERMAN; RANDOLPH

OPINION: [*454] PER CURIAM: The case is remanded to the Commission for a more adequate explanation of its interpretation of Rule 2(e)(1)(ii) and its application to this case. The court rejects unanimously, as per Part V of Judge Randolph's opinion, petitioners' challenge to the regularity of the Commission's proceedings.

So Ordered.

SILBERMAN, Circuit Judge: The Commission suspended petitioners, partners in a national accounting firm, for "improper professional conduct" under Rule 2(e)(1)(ii). As I cannot determine from the order just what the Commission is using as its standard for improper professional conduct, I think the appropriate course is to remand (which we do) for the Commission to clarify its position before we substantively review the order. [**3] See Philadelphia Gas Works v. FERC, 300 U.S. App. D.C. 374, 989 F.2d 1246, 1251 (D.C. Cir. 1993).